UNIVERSITY OF ALBERTA

AN APPRAISAL OF THE INTERNTIOANAL OIL POLLUTION LIABILITY REGIME

by

Muhammad Masum Billah ©

A thesis submitted to the Faculty of Graduate Studies and Research in partial fulfillment
of the requirements for the degree of Master of Laws.

Faculty of Law

Edmonton, Alberta
Fall, 2003

National Library
of Canada

Acquisitions and
Bibliographic Services

395 Wellington Street
Ottawa ON K1A 0N4
Canada

Bibliothèque nationale
du Canada

Acquisisitons et
services bibliographiques

395, rue Wellington
Ottawa ON K1A 0N4
Canada

Your file Votre référence
ISBN: 0-612-87559-8
Our file Notre référence
ISBN: 0-612-87559-8

The author has granted a non-exclusive licence allowing the National Library of Canada to reproduce, loan, distribute or sell copies of this thesis in microform, paper or electronic formats.

The author retains ownership of the copyright in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author's permission.

L'auteur a accordé une licence non exclusive permettant à la Bibliothèque nationale du Canada de reproduire, prêter, distribuer ou vendre des copies de cette thèse sous la forme de microfiche/film, de reproduction sur papier ou sur format électronique.

L'auteur conserve la propriété du droit d'auteur qui protège cette thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou aturement reproduits sans son autorisation.

Canada

UNIVERSITY OF ALBERTA
Library Release Form

Name of Author: **Muhammad Masum Billah**
Title of Thesis: **An Appraisal of the International Oil Pollution Liability Regime**

Degree: **Master of Laws**
Year This Degree Granted: **2003**

Permission is hereby granted to the University of Alberta Library to reproduce single copies of this thesis and to lend or sell such copies for private, scholarly or scientific research purposes only.

The author reserves all other publication and other rights in association with the copyright in the thesis, and except as herein before provided; neither the thesis nor any substantial portion thereof may be printed or otherwise reproduced in any material form without the author's prior written permission.

Muhammad Masum Billah

Date Submitted to FGSR: August 29, 2003

ABSTRACT

The thesis aims at finding a better international oil pollution liability regime. To this effect, it examines the past and present oil pollution liability systems. It establishes that the international oil pollution liability regime has made significant progress since the *Torrey Canyon* oil pollution incident in 1967. Strict liability for oil pollution, compulsory insurance on shipowners to meet the liability and the creation of the International Oil Pollution Fund to supplement the shipowners' liability are all very innovative and praiseworthy measures.

Despite all this progress, the thesis contends that the international oil pollution liability regime is still far from perfect. The thesis identifies the liability limit, amendment procedure to increase the limit and environmental damage assessment as areas which need further improvements. To this end, the thesis takes up the American oil pollution liability regime as a case for comparative study and offers some tentative recommendations.

UNIVERSITY OF ALBERTA

Faculty of Graduate Studies and Research

The undersigned certify that they have read, and recommend to the Faculty of Graduate Studies and Research for acceptance, a thesis entitled ***An Appraisal of the International Oil Pollution Liability Regime*** submitted by **Muhammad Masum Billah** in partial fulfillment of the requirements for the degree of **Master of Laws.**

David Percy (Supervisor)
Professor, Faculty of Law

Elaine Hughes
Professor, Faculty of Law

Dr. Tom Keating
Professor, Department of Political Science

Date: Aug 28th **2003**

This thesis is dedicated to-

The memory of my late grandmother **Rahtennisa Begum**

ACKNOWLEDGEMENT

My thanks primarily go to my supervisor, Professor David Percy, to whom I owe an immense debt of gratitude. His constructive criticisms and suggestions were most helpful in the course of this work. I would also like to express my gratitude to Professors Elaine Hughes and Dr. Tom Keating for accepting to sit in my thesis committee.

I am most grateful to my parents for their constant prayers for me. My wife, Tahmina Anzum, deserves special thanks for her love, support and encouragement to complete this thesis.

My deep appreciation goes to the Alberta Law Foundation for offering me the scholarship to pursue my study at the University of Alberta. I am also thankful to the Faculty of Law for generous research grants. Without all this financial assistance, this work would not have been possible.

I am thankful to all the staff of Faculty of Law, especially Kim Wilson, Sheila Parr and Cheryl Robison. I wish to render my sincere thanks to the staff of John A. Weir Law Library, in particular, Janet Janke, Janice MacLean and Michael Storozuk, in helping me find out the materials I needed to complete this work.

I will also like to express my sincere appreciation to my friend Ubaka Ogbogu for his time to read and edit my thesis. I finally thank all my friends and colleagues for their prayers and support during this period, especially to Amar bin Halim, Salim Ahmed, Showkat Choudhuri, Omolara Oladipo, Hua Wei, Olumide Adetunji, Cathy Ann Pachnowski, Subuola Majekodunmi and Leonard Magawa.

TABLE OF CONTENTS

INTRODUCTION 1

CHAPTER ONE: HISTORICAL BACKGROUND OF THE LIMITATION OF LIABILITY 8

I. Origin of the Limitation Principle in Maritime Law 9
II. International Conventions on Limitation 15
III. Conventions on Oil Pollution 18
IV. American Law on Oil Pollution 22
V. Justifications for the Limitation of Liability in Maritime Claims 23
VI. Justifications at the Present Time 25

CHAPTER TWO: OIL POLLUTION LIABILITY UNDER THE COMMON LAW 30

I. Various Causes of Action in Common Law 31
    A. Negligence 31
    B. Trespass 35
    C. Public nuisance 40
    D. Private nuisance 45
    E. Strict liability 48

II. Principles of Compensation and Causation 51
    A. Basic Principle of Compensation 51
    B. Causation 52

III. Recoverable Damages 54
    A. Physical damage 54
    B. Economic loss 55
    C. Environmental damage 60
IV. Conclusion 63

CHAPTER THREE: INTERNATIONAL LIABILITY REGIME 65

I. Recoverable Damage 65
    A. Physical damage 66
    B. Economic loss 68
    C. Environmental damage 70
    D. Cost of preventive measures 73

II Positive Aspects of the International Liability Regime 74
    A. Strict Liability 74
        1. Full Exoneration 75

2. *Partial Exoneration* 75
B. Compulsory Insurance 77
C. Direct action against the insurer 78
D. International Oil Pollution Compensation (IOPC) Fund 80

III. Negative aspects of international liability regime 81
A. Limited and inadequate amount 81
B. Amendment procedure for increasing the limit 86
C. The test to break the limit 88
D. Channeling of liability to shipowners only 91
E. Environmental Damage 92

IV. The 2003 Protocol 93
A. Problem to be solved by the Protocol: the inadequacy of the liability amount 95
B. Problems not to solved by the Protocol 96
C. Various aspects of the Protocol 98
1. *Adequate Compensation* 98
2. *An insurance fund or liability fund?* 99
3. *Non-submission of oil report* 101
4. *Optional liability* 101
5. *The Model of the 1992 Fund* 102
6. *Administration of the Supplementary Fund* 103
7. *Definition of various terms* 103
8. *Jurisdiction, recourse and final clauses* 104
V. Conclusion 106

CHAPTER FOUR: AMERICAN LIABILITY REGIME 108

I. Recoverable Damage 108
A. Physical damage 109
B. Economic loss 110
C. Environmental damage 113

II. Positive Aspects of the OPA'90 117
A. Better Compensation 117
B. Wider Scope of Liability 120
1. *Scope of Polluting Substances and Sources* 120
2. *Responsible Party* 121
C. Easily Breakable Test 124
D. More Environmentally Friendly 127
E. Oil Spill Liability Trust Fund 128

III. Negative aspects of the OPA'90 131
A. Non-preemption of State Laws 131
B. Exclusion of 'Public Vessel' from Liability 134

C. Civil and Criminal Penalties 135
IV. Conclusion 139

CONCLUSION 141

BIBLIOGRAPHY 146

INTRODUCTION

"If my dog kills your sheep and I freshly after the fact tender you the dog you are without recourse against me."[1] Traditionally this was the principle upon which a shipowner's liability was based; the value of the ship after an incident was the maximum liability on the shipowner. Thus, if the ship was a total loss, there was no liability at all. On the basis of this principle, in the epoch-making *Torrey Canyon* oil spill incident in 1967 the liability of the shipowner was held to be US$50,[2] while the clean up cost the UK and the French governments US$15 million.[3] This incident woke up the international community to the danger of oil pollution and led them to adopt a special liability regime to deal with oil pollution from ships.

Today the oil pollution liability regime consists of two international conventions. They are: 1) the International Convention on Civil Liability for Oil Pollution Damage, 1969,[4] as amended by 1992 Protocol [hereinafter the Liability Convention] and 2) the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971,[5] as amended by the 1992 Protocol [hereinafter the Fund Convention].[6] While the Liability Convention deals with the shipowners' liability, which is strict but limited, the Fund Convention created the International Oil Pollution Compensation Fund (IOPC Fund) to pay damages in cases where damages exceed the limit of the shipowner's liability or where there is no liability at all on shipowners. However, the Fund's liability is limited as well, albeit at a higher amount. Presently, the maximum obtainable amount from the IOPC Fund is SDR135 million,[7] whether combined with shipowners' liability or alone.

---

[1] These are the wordings of a judge in the time of Edward III, cited by Holmes J. in *Liverpool, Brazil and River Plate Steam Navigation Co.* v. *Brooklyn Eastern District Terminal,* 251 U.S. 48 at 53 (US Supreme Court 1919). The principle of surrender is based on the Roman law doctrine *noxae deditio.* See O. W. Holmes, *The Common Law*, (Boston: Little, Brown and Company, 1949) at pp. 6-13.

[2] The value of a single salvaged lifeboat; see *In re Barracuda Tanker Corp.,* 281 F. Supp. 228, 1968 U.S. Dist. LEXIS 9998 (S.D.N.Y. 1968).

[3] However, the claim was finally settled at US$3 million. See L.I. Kiern, "Liability, Compensation, and Financial Responsibility Under the Oil Pollution Act of 1990: A Review of the First Decade" (2000) 24 Tulane Maritime Law Journal, 481 at 503 [hereinafter Kiern].

[4] 973 U.N.T.S.3; 9 I.L.M. 45 (1970).

[5] 16 I.L.M 621 (1972).

[6] Canada is a party to both the Conventions. Yet Canada has a unique mechanism in providing adequate fund to clean up oil pollution in its water and to compensate its nationals in case of non compensation or under compensation by the international regime. See generally *Ship-source Oil Pollution: the*

The special liability regime for oil pollution is a very innovative and praiseworthy step in dealing with oil spills around the world. There is no way today for a shipowner to incur $50 liability after an oil spill on sea on the scale of *Torrey Canyon*. Yet, three decades later, the liability of shipowners for damages resulting from oil pollution still remains inadequate and limited. The recent *Prestige* incident in Spain,[8] *Erika* in France[9] and *Nakhodka* in Japan[10] are clear examples of the inadequacy of the damages under the international liability regime.[11] The dissatisfaction of Europe with the inadequacy of the liability amount after the *Erika* incident[12] led the IMO to amend the present limits and to

---

Administrator's Annual Report 2000-2001 (Ottawa: the Administrator of Ship-source Oil Pollution, 2001) at iii [hereinafter *SOPF: the Annual Report 2000-2001*].

[7] Special Drawing Right. It is an artificial monetary unit of International Monetary Fund. Its value is determined on the basis of a basket of currencies; namely, US Dollar, Euro, Pound Sterling and Japanese Yen. SDR1=US$ 1.40767 as of July 01, 2003 and Canadian Dollar 1.898590, online: IMF Homepage <http://www.imf.org/external/np/tre/sdr/basket.htm> (last modified: 01 July 2003).

[8] On November 13, 2002, it broke in two off the coast of Galicia (Spain) spilling an unknown but substantial quantity of its cargo. It was carrying 77000 tonnes of heavy fuel oil. The IOPC Fund estimates that the total amount of the claims arising from the incident will significantly exceed the amount available for compensation, online: the IOPC Fund Homepage <http://www.iopcfund.org/prestige.htm> (last modified: 16 May 2003).

[9] December 12, 1999. See *Annual Report 2001: International Oil Pollution Compensation Fund* (London: IOPC Funds, 2001) at 108 [hereinafter *Annual Report 2001: IOPC Funds*].

[10] January 2, 1997, *ibid.* at 69.

[11] The claims arising from these two incidents are expected to exceed not only the present maximum limit but also the increased limit to be effective from November, 2003. See *SOPF: the Annual Report 2000-2001, supra* note 6 at iii.

[12] Claims submitted up to December 31, 2001, were Ffr 912 million. Further claims totalling Ffr 347 million were awaiting to be submitted. The maximum available fund under the international scheme is Ffr

increase it by 50%.[13] On November 1, 2003 the maximum amount will rise to SDR 203 million. Still dissatisfied with this limit,[14] the Commission of the European Communities (CEC) adopted a 'Proposal for a Regulation of the European Parliament and of the Council on the establishment of a fund for the compensation of oil pollution damage in European waters and related measures' [hereinafter the COPE Fund Proposal].[15] In response to the European measure and to avoid disintegration of the international system,[16] the IOPC Fund adopted the 'Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992', [hereinafter the 2003 Protocol].[17] The Protocol proposes to create a third tier of liability for oil pollution over and above the existing liability limit. The Protocol was adopted in the recent IMO Conference held at London on May 12-16, 2003.[18]

The Protocol, with its SDR750 million (just over US$1 billion) liability fund, will solve the problem of inadequacy to a great extent. However, some other problems will still remain in the international oil pollution regime. Among those problems is the present amendment procedure to increase the liability amount. It is designed in such a way that a fast and significant increase is impossible. Another problem is the almost unbreakable limit on the shipowners' liability. The right of shipowners to limited

---

1, 211 966 811 (SDR 135million). See *Annual Report 2001: IOPC Funds*, *supra* note 9 at 111, 113 and 114.

[13] *SOPF: Annual Report 2000-2001, supra* note 6 at vi.

[14] *Ibid.*

[15] COM (2000) 802 final at 2000/0326 (COD) [hereinafter COM (2000) 802 final], online: EU Homepage <http://www.europa.eu.int/comm/dgs/energy_transport/library/erika2_en_final.pdf> (date accessed: 01 July 2003).

[16] *SOPF: Annual Report 2000-2001, supra* note 6 at iv and vii.

[17] The final version of the Protocol can be found in the IOPC Fund's document: LEG/CONF.14/20 and the draft Protocol in 92FUND/A.6/28, Annex I.

[18] Press release of IOPC Fund Meetings April 2002, online: the IOPC Fund Homepage <http://www.iopcfund.org/npdf/April02news.pdf> (date accessed: 03 August 2002).

liability is undeniable even in the case of negligence or gross misconduct of the shipowner or its servants. A shipowner will be deprived of the right to rely on the limit only if "the pollution damage resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result."[19] In addition to these limits, the environmental damage assessment under the international regime does not reflect the growing concern for greater protection of marine flora and fauna.

The United States played a leading role in the preparation of the oil pollution Conventions, but refused to ratify the Conventions, objecting to the inadequacy of the liability amount and the pre-emption of state laws.[20] Instead, it passed much federal legislation to deal with both general oil pollution liability and liability in specific geographic areas.[21] The need for a comprehensive oil pollution liability had long been evident and Congress had been debating the issue over 15 years. Fortunately or unfortunately, the *Exxon Valdez* disaster in 1989 brought an end to the Congressional debate and Oil Pollution Act of 1990 (OPA'90) was born on August 18, 1990.[22] The OPA'90 addressed the oil pollution liability solution much more efficiently and effectively than international regime. The Act provides a larger available fund for pollution damage. For example, the government has the power to spend US$1 billion per incident from the Oil Spill Liability Trust Fund (OSLTF).[23] The shipowners' right to limit liability can easily be denied for gross negligence or willful misconduct. There is no hurdle to increase the limit of liability when the need arises. However, a decade after its inception, the OPA'90 does not appear totally flawless. Its failure to pre-empt state laws and the excessive amount of civil and criminal penalty are the main sources of criticism.[24]

---

[19] Art. V (2), the Liability Convention.

[20] E. Gold, "Marine Pollution Liability After "Exxon Valdez": The U.S. "All-Or-Nothing Lottery!" (1991) 22 Journal of Maritime Law and Commerce 423 at 424 [hereinafter Gold].

[21] Kiern, *supra* note 3 at 507.

[22] PL 101-380 (HR 1465).

[23] 26 U.S.C. § 9509 (c)(2)(A).

The purpose of this thesis is to analyze the international oil pollution liability regime and to recommend changes necessary in it in the light of this study. To this end, the thesis takes up the American oil pollution liability regime as a case for comparative study. However, it is fair to say at the outset that the international regime achieved tremendous success in providing adequate compensation compared to its precursors i.e., general maritime law and common law. This necessitates an examination of the pre-existing laws on oil pollution. This examination will mainly be confined to common law,[25] as it is the only predecessor to the modern liability regimes which still has some relevance to oil pollution, particularly in common law countries. Common law remains applicable when the international regime does not apply to a particular oil pollution incident, either because the polluting oil does not fall under the definition of 'persistent oil' in the international regime or because the spill is from the bunker of a ship which is not an oil tanker.[26] In fact, 88% of the Canadian oil spills from 1993 to 2000 were not covered by the international liability scheme and they are paid from the Canadian Ship-source Oil Pollution Fund (SOPF).[27]

---

[24] See Kiern, *supra* note 3 at 488 and 570.

[25] Common law here is used to mean opposite to statutory law.

[26] A new convention was adopted in 2001 for bunker (fuel) oil pollution: International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001. IMF Document: LEG/CONF.12/19 (March 27, 2001). The convention is unlikely to come into force in near future because of the high number of states required to ratify it and its possible conflict with a European Community regulation (EC) 44/2001. See *SOPF: the Annual Report 2000-2001, supra* note 6 at 41.

As indicated at the outset, a common feature of shipowners' liability both in common law and civil law countries long before any international conventions was the right of shipowners to limit their liability to the value of ship. Historically this right was granted mainly to encourage investment in the then nascent shipping industry and to protect shipowners from unlimited liability caused by perils of the sea or incidents beyond their control. These reasons no longer hold good today as the shipping industry is advanced enough to require no government incentives to protect itself from perils of the sea. However, the policy became permanently entrenched for all types of damage, including that arising from oil pollution. Both the international regime and the American law have incorporated the right of limitation, although the right is more protected under the international law. Now the time has come to examine the reasons and justifications in maintaining this policy. The thesis attempts to prove that the right is no longer justified particularly on the traditional grounds. The proponents of the right argue new justifications such as unavailability of insurance in case of unlimited liability. However, this can be overcome by fixing an insurable limit for insurance purposes only, while the liability on shipowners could be unlimited.

Chapter One examines the historical justifications of shipowners' right to limit their liability and their viability in the present day. The chapter also mentions the theoretical aspect of civil liability in general and how the concept of limitating shipowners' liability contradicts the principle of civil liability: putting the victim in its original position as far as money can do so. The chapter concludes that the concept of limited liability for marine pollution, in general, and oil pollution, in particular, is not justified either in principle or in policy.

---

[27] *Ibid.* at ii.

Chapters Two, Three and Four discuss oil pollution liability under the common law, international regime and the American law respectively. To enable a proper comparison to occur, the structure of each of the three chapters is similar. All start with the discussion of recoverable damages under the particular legal system. Recoverable damages are mainly divided into three categories: physical damage, economic loss and environmental damage. Physical damage includes both damages and injuries to a person, although they are rare in an oil pollution case, and damages to property. Economic loss is used widely to cover both economic loss consequential to property damage and pure economic loss, which covers financial loss that occurs independent of any proprietary interest. Environmental damages consist of cleanup costs, restoration expenses and the diminution value of the natural resources pending restoration. Each chapter then proceeds with a review of the positive and negative aspects of the law discussed in the chapter. These parts of the chapters address the main concern of the thesis by comparing and contrasting the main features of each legal regime. The comparison is required in order to provide a basis for the recommendations for reforms in each system.

The final chapter contains recommendations on how to achieve a better oil pollution regime from the existing legal base, mainly by incorporating the positive aspects of each regime. The thesis concludes with recommendations how to rectify the existing problems under both the international and American oil pollution regimes.

CHAPTER ONE

HISTORICAL BACKGROUND OF THE LIMITATION OF LIABILITY

Limitation of shipowners' liability is a universal concept and has been part of maritime law for long time. The concept refers to the privilege enjoyed by shipowners whereby they can limit their liability for damage caused by their ships.[28] It is an exception to the general principle of law that when a defendant causes injury to a claimant by its negligent conduct or by that of its servant, the defendant must pay damages to the claimant in order to restore the claimant to its previous position.[29] Under the concept of limitation in its original form, a shipowner could limit its liability to the value of the ship and freight. This principle can be linked to the Roman law concept of *naxae deditio*, i.e., an owner is discharged from its liability, if it abandons the offending instrument, i.e. the ship in maritime cases.[30] The concept covers almost all aspects of shipowners' liability, including oil pollution. However, over the last three decades, its validity and viability have been questioned.[31]

The object of this chapter is to analyse the origin of the limitation concept and the rationale behind its introduction in maritime law. Part I of the chapter traces the origin of the limitation. Part II briefly describes the international conventions on general limitation principle. Part III shows the development of international liability regime for oil pollution. For comparison purposes, part IV briefly mentions the American oil pollution liability law. Both the international and the American oil pollution regimes will be discussed in detail later in Chapters Three and Four respectively. Part V examines both historical and present day justifications of the limitation principle. The chapter ends with an attempt to prove that justifications in favor of limitation are weak and that the shipping industry can survive without under-compensating the marine pollution victims through the privilege of limited liability.

---

[28] A.H.E.Popp, Q.C., "Limitation of Liability in Maritime Law - An Assessment of its Viability from a Canadian Perspective" (1993) 24 J. Marit. L. & Com. 335 at 335 [hereinafter Popp].
[29] *Ibid.* at 336.
[30] G. Gauci, *Oil Pollution at Sea: Civil liability and Compensation for Damage*, (Chichester: John Wiley & Sons Ltd, 1997) at 151 [hereinafter Gauci].
[31] Popp, *supra* note 28 at 335.

I. Origin of the Limitation Principle in Maritime Law[32]

The limitation of shipowners' liability is of unknown origin. The famous medieval maritime codes such as the Laws of Oleron or the Laws of the City of Trani are silent on this point.[33] The first evidence of shipowners' right to limitation was found in the 'Amalphitan Table', a commercial code for Italy (Amalphia), in the eleventh century.[34] The concept became firmly established among European nations (except England) by the end of the seventeenth century through the French Ordinance of 1681.[35] The Ordinance provided that a shipowner's liability for the acts of the master is discharged upon relinquishing the ship and freight.[36] With slight change of phraseology, the French Ordinance of 1681 was carried into commercial codes of all other civil law based maritime nations.[37]

In England, the first legislation relating to the shipowners' right to limitation was passed in 1734.[38] The Act, the *Responsibility of Shipowners Act*, was the result of a petition by shipowners to the British Parliament following the decision in *Boucher* v. *Lawson*,[39] where the shipowners were held personally liable for the full amount of a cargo of bullion which had been stolen by the master. The Act limited shipowners' liability to the value of the ship and freight for theft or embezzlement by the master and mariners. In 1784, as a result of another incident, where the shipowners were sued for goods lost by robbery, the right to limitation was extended to robbery.[40] In 1813, another Act was passed to limit shipowners' liability for damages arising from the negligence of the master and mariner.[41] The preamble to the 1813 Act provides the purpose of the Act as to "Increase the Number of the Ships and Vessels belonging to the United Kingdom, registered according to Law, and to prevent any Discouragement to Merchants...and others."[42]

---

[32] See generally, J. J.Donovan, "The Origins and Development of Limitation of Shipowners' Liability" (1979) 53 Tulane Law Review, 999 [hereinafter Donovan].
[33] H. Putnam, "The Limited Liability of Ship-owners for Master's Faults" (1883) 17 Am. L. Rev. 1 at 1 [hereinafter Putnam].
[34] *Ibid.* at 1001.
[35] *The Main* v. *Williams*, 152 U.S. 122 at 126 (1894) (Supreme Court of the United States).
[36] *Ibid.*
[37] *Ibid.*

In all this legislation, a shipowner could limit its liability to the value of the ship and freight for the voyage.[43] The assessment method for valuation of a ship in England differed from that of the continental Europe. While the British courts used the pre-accident valuation, the European courts considered the post-accident valuation. In other words, the British court held the value of the ship and freight was to be estimated as it stood immediately prior to the accident.[44] This method of valuation encouraged the British shipowners "to send ill-found ships to sea and to refrain from increasing their value by repairs."[45] The Parliament in 1854 fixed the liability of shipowners on the basis of ship's tonnage.[46] For personal injuries and loss of life the aggregate liability was not to exceed £15 per ton and for damage to vessels, goods, etc. £8 per ton.[47] On the other hand, in most Continental European countries shipowners could limit their liability to the value of the ship after the accident plus freight.[48]

---

[38] Popp, *supra* note 28 at 335.
[39] (1734) 95 Eng. Rep. 53.
[40] Donovan, *supra* note 32 at 1008.
[41] *Ibid* at 1009.
[42] Preamble to 53 Geo. 3, c. 159; cited in Donovan, *supra* note 32 at 1009.
[43] *Hearing on H.R.4550 Before the House Committee on Merchant Marine and Fisheries,* 74th Cong., 1st Sess. (1935) 253 at 254 [hereinafter *1935 Hearings*].
[44] *Ibid.*

Among the Continental European countries, there are two variants of the assessment of liability: *abandonment* system and *execution* system.[49] Under the abandonment system, the shipowner's liability was personal and unlimited. However, by abandoning its ship and freight to the claimants the shipowner could limit its liability.[50] It required some express acts of the shipowner, such as surrender of the ship or correspondence or an official notice to that effect.[51] France and most other European countries adopted this system.[52] Under the *execution* system, which was in force in Germany and the Scandinavian states, there was no personal liability on the shipowner.[53] The claims are automatically enforced against the ship and the freight.[54] There was no need for any express acts on the part of the shipowner.

The English legislation became part of law of Canada and other parts of the former British Empire by reception.[55] Later when Canada achieved independence, the concept of limitation of shipowners' liability was incorporated in Canadian statutes.[56] At present, the Marine Liability Act[57] provides the limitation of liability for Canadian shipowners. The Act is, to a large extent, a reproduction of various international conventions governing the limitation of shipowners' liability, even though Canada is not party to some of the conventions incorporated into the Act.[58]

---

[45] Putnam, *supra* note 33 at 13.
[46] *Merchant Shipping Act,* 17 and 18 Vict. Ch. 104, sect. 504; cited in *ibid* at 13.
[47] *Ibid.*
[48] P. Griggs, "Limitation of Liability for Maritime Claims: the search for international uniformity", (1997) Lloyd's Maritime and Commercial Law Quarterly 369 at 372 [hereinafter Griggs].
[49] Professor E. Selvig, "An Introduction to the 1976 Convention" in *Limitation of Shipowners' Liability: the New Law* (London: Sweet & Maxwell, 1986) 3 at 3[hereinafter Selvig].
[50] *Ibid.*
[51] Putnam, *supra* note 33 at 8-9.
[52] *Ibid.* at 11.
[53] Selvig, *supra* note 49 at 3.
[54] *Ibid.*

In the United States, the states of Massachusetts and Maine enacted legislation in 1819 and 1821 on this matter based on the English-model.[59] It was not until 1851 that Congress passed the first federal legislation on shipowners' right to limit liability.[60] As in England, the first American Act on limitation was prompted by a court decision imposing liability on shipowners despite a contractual limitation.[61] In *the Lexington*,[62] the Supreme Court found the shipowners liable for about $18,000 in coin which was lost by fire aboard the ship.[63] The decision spurred the shipping industry to appeal to Congress for protection similar to that found in England.[64] On March 03, 1851, Congress passed the Limitation of Liability Act[65] in order to place the American commercial marine "upon the same basis as that of England."[66] Under the Act, a shipowner's liability was limited to the owner's interest in the ship and the freight.[67] Although the Act did not describe how to assess the value of a ship, the Supreme Court in the first case under the Act, *The City of Norwich*,[68] adopted the continental valuation method to assess the liability of the shipowners.[69] In subsequent cases courts applied this valuation method.

---

[55] Popp, *supra* note 28 at 337.

[56] *Ibid.* The following statutes incorporated the limitation of liability provisions over the years: An Act to Amend the Law Respecting the Navigation of Canadian Waters, 1864 (27-28 Vict. Cap. XIII); An Act Respecting the Navigation of Canadian Waters (31 Vict. Cap. 58); An Act to make Better Provision Respecting the Navigation of Canadian Waters (31 Vict. Cap. 58); (Consolidated Act, R.S.C. 1886 (49 Vict. Chap. 79); Canada Shipping Act, R.S.C. 1906, c. 113; Canada Shipping Act, R.S.C.1952, c. 29; Canada Shipping Act, R.S.C. 1960-61, c. 32; Canada Shipping Act, R.S.C. 1970, c. S-9; and Canada Shipping Act, R.S.C. 1985, c. S-9; taken from *ibid.* footnote 3.

[57] S.C. 2001, c. 6.

[58] For example, Canada is not a party to the Convention on Limitation of Liability for Maritime Claims, 1976. However, Part 3 of the Act contains mainly the provisions of the Convention.

[59] Donovan, *supra* note 32 at 1009.

[60] *Ibid.* at 1009-1017.

[61] *Ibid.*

[62] *New Jersey Steam Navig. Co.* v. *The Merchants' Bank of Boston (The Lexington)*, (1848 Supreme Court of the United States) 47 U.S. (6 How.) 344.

[63] *The Main* v. *Williams* 152 U.S. 122 at 128 (1894 Supreme Court of the United States); Donovan, *supra* note 32 at 1012.

[64] Donovan, *supra* note 32 at 1012.

Congress amended the Act on several occasions. Notable among them are those of 1884, 1935 and 1936. By the 1884 amendment, the benefit of the limitation was extended to all claims except seamen's wages, whether arising either *ex contractu* or *ex delicto*.[70] The 1935[71] and 1936[72] amendments made it compulsory for shipowners to establish a minimum limitation fund for personal injury and death claims of $60 per ton. These amendments followed a fire in the passenger liner *Morro Castle* in 1934, which resulted in the death of 135 passengers. By virtue of the limitation principle, the shipowners' liability amounted to only $20,000, while the owners received $2,100,000 from the insurers of the hull.[73] Although the Act is still in force, its application is gradually getting narrower. For example, the OPA'90 expressly excludes the application of the Limitation Act to oil pollution on sea.[74]

---

[65] Act of Mar. 3, 1851, ch. 43, § 9, 9 Stat. 635 (codified as reenacted 4and amended at 46 U.S.C. App. § 188-189).

[66] Cong. Globe, 31st Cong., 2nd Sess. 332(1851) at 713; cited in Donovan, *supra* note 32 at 1015.

[67] 46 USCA § 183 (a).

[68] 118 U.S. 468, 470-71 (1886)

[69] Donovan *supra* note 32 at 1025.

[70] Act of June 26, 1886 (ch. 121, sec. 18, 23 Stat. 57); cited in *1935 Hearings, supra* note 43 at 256.

[71] Act of August 29, 1935 (ch. 804, 49 Stat. 960); cited in Donovan, *supra* note 32 at 1031.

[72] Act of June 5, 1936 (ch. 521, 49 Stat. 1479); cited in *ibid.*

[73] Donovan, *supra* note 32 at 1031.

[74] 33 USCA § 2718 (a) (1) (A)(B).

The benefit of the limitation under the Limitation of Liability Act is only available when the injury or damage occurs without the "privity or knowledge" of the shipowners.[75] When the cause of the damage is fire, the shipowner is exonerated from liability unless the fire is caused by the "design or neglect" of the owner.[76] The phrases "privity or knowledge" and "design or neglect" have no definite meaning in themselves and the courts can give them meaning they like with reference to the particular facts of a case.[77] They are "phrases devoid of meaning. They are empty containers into which the courts are free to pour whatever content they will."[78] In earlier cases, the courts used to construe the meaning of privity and knowledge very restrictively as to give the shipowners the benefit of limitation.[79] Since the later part of the twentieth century, courts have become increasingly hostile to the Limitation Act and are taking a relaxed attitude to interpret the phrases so as to deprive the shipowners from the benefit of limitation.[80] This is because the old reasons for limitation no longer exist. As Justice Black of the US Supreme Court argued,

> "Judicial expansion of the Limited Liability Act at this date seems especially inappropriate. Many of the conditions in the shipping industry which induced the 1851 Congress to pass the Act no longer prevail. And later Congresses, when they wished to aid shipping, provided subsidies paid out of the public treasury rather than subsidies paid by injured persons."[81]

---

[75] 46 USCA § 183 (a).

[76] 46 USCA § 182.

[77] Donovan, *supra* note 32 at 1037.

[78] G. Gilmore and C.L.Black, *The Law of Admiralty* (2d ed) (New York: The Foundation Press Inc., 1975) at 877 [hereinafter Gilmore and Black].

[79] *Ibid.* "In the heyday of the Limitation Act it seemed as hard to pin "privity or knowledge" on the petitioning shipowner as it is thought to be for the camel to pass through the needle's eye."

[80] Donovan, *supra* note 32 at 1034-7.

[81] *Maryland Cas. Co.* v. *Cushing*, (1954) 347 U.S. 409 at 437 (US Supreme Court).

II. International Conventions on Limitation

Due to the difference in the assessment of limitation of liability, there is a tendency of forum shopping both among the shipowners and claimants.[82] Therefore, there is a need to have uniformity in the international maritime law. The *Comit'e Maritime International* (CMI) felt the need and at the beginning of the twentieth century drafted the 1924 International Convention for the Unification of Certain Rules relating to the Limitation of Liability of the Owners of Sea-going Vessels.[83] It was a compromise between the existing systems. It provided the contracting states' shipowners with the option to limit the liability either to the value of the ship and freight or to an amount of £8 per ton.[84] The convention came into force on June 2, 1931, and was ratified or acceded to by 15 States.[85] Now only Brazil, Hungary and Portugal continue to be party to that convention.[86] There is an additional £8 per ton reserved for personal injury claims.[87]

Since very few States were signatories to the 1924 convention, the international community adopted another convention in 1957, the International Convention Relating to the Limitation of the Liability of Owners of Sea-going Ships.[88] It did not give the shipowner the option to limit the liability to the value of the ship. It fixed the per ton liability for both property damage and personal injury.[89] In terms of unification, the 1957 convention was a success. It had 56 state parties at its peak. Yet, the liability amount under the convention was minimal. It provided the same monetary limits as those fixed by the century old English statutes drafted for sailing ships.[90] In addition, the value of monetary limit was greatly reduced over the years due to inflation.

---

[82] For example, in *Oceanic Steam Navigation Company Limited* v. *Mellor (The Titanic)*, 233 U.S. 718 (1914, Supreme Court of the United States) and in *In re Barracuda Tanker Corp. (The Torrey Canyon)*, 281 F. Supp. 228 (S.D.N.Y. 1968), the shipowners resorted to the US law as it was shipowners' friendly at that time. On the other hand, in *In re Oil Spill by The Amoco Cadiz*, 954 F.2d 1279 (7the circuit, 1992), the shipowners wanted to be bound by the then international oil pollution law to which the claimant, France, was a party; while the French government sought the remedy under the American law. There is problem in determining the applicable as the courts' decisions are not in conformity with each other. See W. Tetley, "Shipowners' Limitation of Liability and Conflicts of Law: The Properly Applicable Law" (1992) 23 J. of Marit. L. & Com. 585.

[83] Selvig, *supra* note 49 at 4.

[84] *Ibid.* at 5.

[85] *Ibid.*

[86] B. Soyer, "1996 Protocol to the 1976 Limitation Convention: A More Satisfactory Global Limitation Regime ;for the Next Millennium?", [2000] J. Bus. L. (Journal of Business Law)153 at 153 [hereinafter B. Soyer].

[87] Selvig, *supra* note 49 at 5.

To increase the liability limit, a new convention was adopted in 1976 under the title of Convention on Limitation of Liability for Maritime Claims, 1976 (hereinafter LLMC).[91] The Convention is a compromise between the developed countries, who wanted substantial increase in the limits of liability on shipowners,[92] and the developing countries, who saw the increase as "a threat to their small but growing fleets."[93] The Convention came into force on 1 December, 1986. Many states which were parties to the 1957 convention switched to this convention. It increased the liability limit for both property damage and personal injury many fold. For example, while under the 1957 Convention a shipowner's liability for personal injury or death is about SDR 140 per ton for any kind of ship, under the LLMC it is SDR 666 for a ship of up to 500 tons.[94] For each ton from 501 to 3000 tons, it is SDR 500 per ton.[95] The higher the tonnage is, the lower is the level of liability. Yet, it can never be below SDR 167 per ton.[96] Liability for property damage is about half of that of personal injury and death under the LLMC. On the other hand, it is one third of the level established for personal injury and death under the 1957 Convention.[97] While the convention was satisfactory at the time of its adoption, inflation over the years and other deficiencies[98] led the international law makers to adopt the 1996 Protocol[99] to adjust the amount of liability and to modify other problematic provisions.

---

[88] Online: Admiralty and Maritime Law Guide Homepage <http://www.admiraltylawguide.com/conven/limitation1957.html> (date accessed: 23 Aug. 2003)

[89] The liability was set in poincare′ gold francs. If there is only property claims or personal injury and death, the liability is 1000 francs (equivalent to SDR 66.7) for each ton and 3100 francs (SDR 206.67) respectively. On the other hand, if an incident gives rise to both kinds of claims, the total liability would be 3100 francs (SDR 206.67) per ton with first 2100 francs (SDR140) exclusively for personal injury and death claims. See art. 3(1)(a), (b) and (c) of the 1957 Convention. Poincare′ gold franc is "a unit consisting of sixty fine and a half milligrams of gold of millesimal fineness nine hundred." Art. 6 of the 1957 Convention. However, at the 1957 Convention, the liability was negotiated in pounds sterling. 1000 poincare′ gold francs were equivalent to £24.

[90] Selvig, *supra* note 49 at 6.

[91] 16 I. L. M. 606 (1977).

[92] For example, Canada and the United States advocated high limits.

[93] Popp, *supra* note 28 at 346-7.

The 1996 Protocol provides a great increase in the limits of liability. The average amount of increase is about 250 per cent.[100] For smaller ships, it is much higher. For example, under the original LLMC, the total liability for a ship of 500 tons is SDR 500,000. Under the 1996 Protocol, it is SDR 3 million, a six-fold increase.[101] Among other notable changes, the Protocol introduced tacit amendment procedures to increase the liability limit.[102]

---

[94] Art. 6 (1)(a)(i). Ton is used here to mean gross tonnage [Art. 6(5)]. Gross tonnage is a measure of the internal capacity of a ship, tug or barge. It is a cubic or space measurement of all areas of a vessel with some allowances or deductions for exempt spaces such as living quarters.

[95] Art. 6 (1)(a)(ii).

[96] This is the limit for any ship with more than 70,000 tons. See Art. 6 (1)(a)(ii).

[97] For example, for a ship of 500 tons or below the liability is set at SDR 167,000 (SDR 334 per ton). See Art. 6 (1)(b)(i).

[98] Such as the amendment procedure to increase the liability limit, the clarification of some provisions relating liability in salvage reward. See generally B. Soyer, *supra* note 86.

[99] Unfortunately this Protocol has not come into force. As of 30th of June, 2003, only eight States have ratified.; whereas Art.11 para 1 of the Protocol provides that it will come into force ninety days after the date on which ten States have ratified it. Online: the IMO Homepage <http://www.imo.org/HOME.html> (follow links for conventions/ status of the conventions) (last modified: 30 June, 2003).

[100] B. Soyer, *supra* note 86 at 158.

[101] *Ibid.* at 159.

[102] See Art. 8 of the Protocol. Similar amendment procedures are also incorporated into the Liability and

It is noteworthy that the limitation under the LLMC is a general liability regime. It applies to the all areas of maritime liability unless an area is expressly excluded from its ambit. Liability for oil pollution is excluded from the Convention,[103] as such liability is governed by a special regime.

III. Conventions on Oil Pollution

Until 1969, oil pollution liability was governed by the general maritime liability regime discussed above. The *Torrey Canyon* oil spill in 1967 resulted in a permanent change to the oil pollution liability regime. The ship *Torrey Canyon* spilled 124,000 tons of oil on the sea. It polluted 100km and 80km of English and French coastlines respectively. While the clean up cost the UK and French governments $16 million (80 million French francs),[104] the Southern District Court of New York held in an *ex parte* order that the shipowner's liability amounted to only $50, the value of a single salvaged life boat.[105] The shipowner's liability was limited to the value of the ship after the accident. In this case, the ship was a total loss. However, the governments' claims were ultimately settled at £3 million.[106]

The inadequate amount of liability under the existing law and the dangerous nature of oil pollution led the international community to adopt a special liability regime for oil pollution after the *Torrey Canyon*. Two new conventions were adopted to deal with oil pollution liability. They are the International Convention on Civil Liability for

---

Fund Conventions by their 1992 Protocols. These procedures will be discussed in Chapter Three. See p. 85.

[103] Art. 3 (b) of the LLMC.

[104] Wu Chao, *Pollution from the Carriage of Oil by Sea: Liability and Compensation* (London: Kluwer Law International Ltd, 1996) at 34 [hereinafter Chao].

[105] *In re Barracuda Tanker Corp.*, 281 F. Supp. 228, 1968 U.S. Dist. LEXIS 9998 (S.D.N.Y. 1968).

[106] *Ibid.*

Oil Pollution Damage, 1969 (Liability Convention, 1969),[107] and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971 (Fund Convention, 1971).[108] While the first convention imposes a higher financial liability on owners of oil tankers than that of the general liability regime, the second convention creates a fund, the International Oil Pollution Compensation Fund (IOPC Fund). The fund pays compensation to a claimant when it does not receive any from the shipowner or when the claims exceed the shipowner's liability limit.[109] The fund is financed by cargo interests (i.e., the oil companies) to meet the additional liability for oil pollution. Initially, the combined maximum liability amount under these two conventions was SDR30m,[110] out of which a shipowner's maximum liability was SDR14m[111] and the rest comes from the IOPC Fund. The conventions thus ensure that the burden of compensation is spread between shipowners and cargo interests.

In 1978, the world witnessed an even worse oil spill disaster in *the Amoco Cadiz* incident.[112] The ship spilled 220,000 tons of crude oil on the coast of Brittany, damaging approximately 180 miles of the coastline in one of the most important tourist and fishing regions in France. Realizing that the recovery of full compensation would not be possible under international law to which France was a party, the French government sued the shipowner and its parent company, Amoco International Oil Company, in a US court, where the parent company had its headquarters. The shipowner, Amoco Transport, was held liable under the US Limitation of Liability Act without the benefit of limitation as the court found negligence on the part of the owner because the owner "did not meet its burden of proving its lack of privity or knowledge of the negligence that led to the ship's grounding."[113] The shipowner was held liable to pay $61 million plus 11.9% prejudgment interest from 1978-1991,[114] while the shipowner's liability under the Liability Convention would have been only $16 million.[115]

---

[107] 973 U.N.T.S.3; 9 I.L.M. 45 (1970). Canada has adopted the international law in Part 6 of the Marine Liability Act, 2001, S.C. 2001, .6.

[108] 16 I.L.M 621 (1972).

[109] See art. 4 of the Fund Convention.

[110] Art.4.4(b) of the Fund Convention, 1971.

[111] The shipowner's liability is determined by the size of the ship. It was SDR 133 per ton of the ship's tonnage, or SDR14m in aggregate, whichever is lower. See, Art.V.1 of the Liability Convention, 1969.

[112] See *In re Oil Spill by the Amoco Cadiz*, 954 F.2d 1279 (7the circuit, 1992).

In the aftermath of this incident, the world realized that even the maximum amount under the special liability regime was too little to cover damage of such a catastrophic nature. Therefore, in 1984, a new protocol[116] was adopted to increase the limit. The Protocol was designed in such a way that it required ratification by the United States to come into force.[117] Although the Protocol incorporated many of the demands made by the US delegation to the Conference,[118] Congress never ratified it, citing the inadequacy of the compensation amount and the pre-emption of state laws as reasons.[119]

In the mean time, the *Exxon Valdez* oil spill occurred in Alaska in 1989, causing the most serious environmental pollution in US history. Following the incident, Congress passed the[120] OPA'90 to deal with oil pollution damage. With the passage of this Act, any hope for US ratification of the 1984 Protocol was finally lost.[121] Consequently, the contracting states to the international oil pollution liability regime adopted another Protocol in 1992.[122] The 1992 Protocol contained similar increases and other changes to those provided in the 1984 Protocol, with no requirement of U.S. participation so that the Protocol could come into force without US ratification or accession.[123] The 1992 Protocol came into force in 1996. Now the maximum compensation amount under both conventions can be up to a maximum of SDR135million.[124]

---

[113] *Ibid.* at 1340.

[114] *Ibid.* at 1330.

[115] *Ibid.* at 1310.

[116] Protocol of 1984 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1984, 23 I.L.M. 177 (1984) and Protocol of 1984 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971, 23 I.L.M. 195 (1984).

[117] Article 13 of the 1984 Protocol: "This Protocol shall enter into force twelve months following the date on which ten States including *six States* each with not less than one million units of gross tanker tonnage have deposited instruments of ratification, acceptance, approval or accession with the Secretary-General of the Organization." (emphasis added).
Without the USA, the requirement of six States with one million gross tanker tonnage, cannot be fulfilled.

[118] T.J.Wagner, "The Oil Pollution Act of 1990: An Analysis" (1990) 21 J. Mar. L & Comm, 569 at 572 [hereinafter Wagner]. The achievements are the increased limits, expanded geographic coverage, compensation for restoration of natural resources, economic losses and preventive measures, tacit amendment procedure for future increase in limits.

[119] *Ibid.*

The 1992 Protocol also instituted changes in the amendment procedure for increasing the liability limit in the future. It incorporated a 'tacit acceptance' amendment procedure into the conventions. Under the new procedure, an increase can be made by the International Maritime Organization (IMO)'s Legal Committee at the request of one quarter of the contracting states.[125] When the Legal Committee makes a new increase, the increase will automatically come into force at the expiry of a certain time limit. The

---

[120] PL 101-380 (HR 1465), codified at 33 USCA §§ 2701-2761.

[121] Because the US will ratify an international regime only when its liability limit, environmental protection and other positive aspects are stronger than or at least as strong as those in the OPA'90. Sec. 3001 of the OPA'90 provides, "It is the sense of the Congress that it is in the best interests of the United States to participate in an international oil pollution liability and compensation regime that is at least as effective as Federal and State laws in preventing incidents and in guaranteeing full and prompt compensation for damages resulting from incidents."

[122] *Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969. Protocol of 1992 to amend the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971.* (London: IMO, 1996).

[123] Art.13(1)of the 1992 Protocol reads, "This Protocol shall enter into force twelve months following the date on which ten States including *four States* each with not less than one million units of gross tanker tonnage have deposited instruments of ratification, acceptance, approval or accession with the Secretary-General of the Organization."(emphasis added).

[124] Art.4.4(a) of the Fund Convention, 1971, as amended by the 1992 Protocol.

[125] Art.14 of the Liability Convention, 1969 and art 33 of the Fund Convention, 1971, as amended by the 1992 Protocols.

Legal Committee has already exercised its new power under the 1992 Protocol. On October 18, 2000, the Committee increased the present amount by 50.3%. The increase takes effect from 1st November 2003 unless one quarter of the Contracting States object before 1st May 2002.[126] No such objection was made during that period.

IV. American Law on Oil Pollution

The United States was never part of the international oil pollution liability regime. It never ratified any international convention dealing with oil pollution mainly because of the inadequate liability amount in the international law.[127] Besides, ratification would have meant that international law would have pre-empted state laws. In 1990, it passed its own law to deal with oil pollution liability, namely, the OPA'90.[128] Prior to the OPA'90, there were four federal statutes on oil pollution liability,[129] the Federal Water Pollution Control Act,[130] the Outer Continental Shelf Lands Act,[131] the Deepwater Port Act[132] and the Trans-Alaska Pipeline Authorization Act.[133] While the first statute provided the general and basic scheme for oil pollution liability, the other three statutes addressed oil pollution liability in specific areas as their titles suggest.[134] Although the OPA'90 did not expressly supersede the above statutes, the OPA'90 would be the applicable law when there is a discharge of oil into US water.[135]

---

[126] *Texts of the 1992 Conventions on Liability and Compensation for Oil Pollution Damage* (International Oil Pollution Compensation Fund 1992: 2001) at 45-51[hereinafter *Texts of the 1992 Conventions*].
[127] Gold, *supra* note 20 at 424.
[128] *Ibid.*
[129] I. Kim, *Restructuring the Liability Regime in the Oil Pollution Act of 1990* (PhD Thesis, Stanford University, 2000) at 79 [hereinafter Kim].
[130] Pub. L. No. 92-500, 86 Stat. 816 (1972); cited in *ibid.*
[131] Pub. L. No. 95-372, 92 Stat. 629 (1978); cited in *ibid.*
[132] Pub. L. No. 93-627, 88 Stat. 2126 (1974); cited in *ibid.*
[133] Pub. L. No. 93-153, 87 Stat. 576 (1973); cited in *ibid.*
[134] See *ibid* at 79-81.
[135] 33 USCA § 2702 (a).

The provisions of the OPA'90's are more favorable to victims and the environment than those of the international regime. The distinctive feature of the OPA'90 is that it does not pre-empt state laws.[136] A number of US States like California, Maryland and Alaska impose unlimited liability on shipowners for both clean-up costs and damage to natural resources and third parties.[137] In addition, shipowners under the OPA'90 are easily deprived of the right to limit liability for various reasons.[138] Claimants under the OPA'90 may resort to the Oil Spill Liability Trust Fund (OSLTF) for their uncompensated claims.[139] The maximum obtainable amount from OSLTF is US$ 1 billion per incident;[140] in contrast, the maximum amount is SDR135m (US$190m) under the international system.

V. Justifications for the Limitation of Liability in Maritime Claims

Limitation of liability is a privilege granted to shipowners. There are both historical and economic reasons for this privilege. Among the historical reasons, the sailing ships of the past were extremely prone to the perils of the sea. In addition, they were totally out of the control of their owners for long periods as there were no means of communication between shipowners and their servants, the master and the mariners. Ships used to spend many months, sometimes years, away from their home ports, out of touch with the owners. It therefore seemed unjust to impose liability on shipowners for the acts or omissions of the masters and crew under the principle of vicarious liability, which made a master responsible for the fault of servants in the course of their employment.[141]

---

[136] 33 USCA § 2718(a), "Nothing in this Act...shall–(1) affect, or be construed or interpreted as pre-empting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to (A) the discharge of oil or other pollution by oil within such State; or (B) any removal activities in connection with such a discharge...."
[137] Gauci, *Supra* note 30 at 155.
[138] See *infra* the chapter on the OPA'90.
[139] 33USCA § 2713(d).
[140] 26USC § 9509(c)(2)(A).

This was the rationale behind the enactment of the first English legislation on limited liability of shipowners.[142] It provided that no shipowner should be responsible beyond the value of the ship and the freight for any loss or damage to goods on board the ship by embezzlement of the master or mariners.[143] Grotius, speaking of maritime law in Holland, said in 1625, "Men would be deterred from employing ships, if they lay under the perpetual fear of being answerable for the acts of their masters to an unlimited extent.... [This would not be] conducive to the public good."[144]

Various shipping nations used limitation of liability for maritime claims as an economic incentive to attract investment in the shipping sector. In the past, there were relatively fewer ships. In order to encourage potential investors to invest in shipping ventures, the concept of limited liability was adopted into legislation by individual states. For example, this reason was clearly stated in the preamble of 1734 Act thus,

> "Whereas it is of the greatest consequence and importance to this Kingdom, to promote the increase of the number of ships and vessels, and to prevent any discouragement to merchants and others from being interested and concerned therein...."[145]

Similar concerns for investment into shipping sector have been echoed by the American legislatures and courts. For example, in *Moore* v. *American Transportation Co.*,[146] the court emphasized that the purposes of the Limitation of Liability Act were "to promote the building of ships, and to encourage persons engaged in the business of navigation."[147]

---

[141] See Popp, *supra* note 28 at 336.

[142] The British Parliament passed the *Responsibility of Shipowners Act* of 1734 when a British court held shipowners liable for the theft of bullion by the master.

[143] *Responsibility of Shipowners Act* of 1734, 7 Geo. 2, c.15; cited in *The Main* v. *Williams*, 152 U.S. 122 at 127 (Supreme Court of the United States 1894).

[144] Grotius, DE JURE BELLI AC PACIS 139 (Campbell transl. 1901), quoted in W. Eyer, "Shipowners' Limitation of Liability- new Directions for an Old Doctrine" (1964) 16 Stanford Law Review 370 at 371.

[145] Cited in Griggs, *supra* note 48 at 370.

For countries which incorporated the principle of limitation late into their legislation, they did so to enable their national shipping sector to compete with other countries' shipping sectors. For example, when the British Parliament enacted its first legislation on limitation, it considered the law of continental states and Holland.[148] Similarly, the US Supreme Court in *Liverpool, Brazil & River Plate Steam Navigation Co.* v. *Brooklyn Eastern Dist. Terminal*,[149] justified the Limitation of Liability Act and stated that it was "to give our shipowners a chance to compete with those of Europe."[150]

F. Justifications at the Present Time

The historical reasons for limitation of liability no longer hold sway in the present day. Today the world has sufficient number of ships not to require any incentives to invest into shipping, particularly at the expense of pollution victims. As a result of excessive financing in the shipping sector during 1968-78, there was surplus of ships for the transportation of goods by sea.[151] At the end of 2001, the total world merchant fleet was 825.6 deadweight tons (dwt)[152] with a surplus of 21.5 million dwt or 2.6% of the world merchant fleet.[153] In addition, with the invention of various modern modes of communications and surveillance, shipowners now have better control over the masters and mariners' activities, such as theft, embezzlement and robbery,[154] even when the ships are in the middle of the high seas.

---

[146] 65 U.S. 1 (Supreme Court of the United States 1860).
[147] *Ibid* at 39.
[148] Donovan, *supra* note 32 at 1007-8.
[149], 251 U.S. 48 (Supreme Court of the United States 1919).
[150] *Ibid* 53.
[151] Kim, *supra* note 129 at 49.
[152] Sometimes termed deadweight carrying capacity, is the difference between the light and loaded displacements of a ship or barge. The Deadweight tonnage comprises the cargo, stores, ballast, fresh water, fuel oil, passengers, crew and their effects.

Since the old reasons no longer obtain, newer ones are canvassed. Now the capacity of insurance market may be the only feasible argument to keep the system of limitation alive. However, its validity can be questioned. The thrust of the argument is that if shipowners have to pay for unlimited liability, they will be unable to get insurance coverage to insure their liability and thus would be unable to pay for oil pollution damage. Yet the reality is that the present maximum liability under international law does not reflect the maximum insurable amount. For example, in the oil pollution liability regime, a shipowner's maximum liability is 59.7 million SDR (around US$75.5 m.). While this amount will be increased to 89.77 SDR (US$113.5 m.) on the 1st Nov. 2003, the International Group of Protection and Indemnity Clubs for shipowners is able to provide insurance coverage up to US$ 4.25 billion under an insurance pool system.[155] In fact, through reinsurance the ship owners' Protection and Indemnity (P&I) Clubs give their members insurance guarantee of US$1 billion per incident.[156] However, for oil pollution liability the ceiling is US$500 m.[157]

---

[153] REVIEW OF MARITIME TRANSPORT, 2002, Summery of Main Developments, (Geneva: UN Conference on Trade and Development, 2002), online: Digital Library of UNCTAD <http://www.unctad.org/en/docs/rmt2002summary_en.pdf> (date accessed: 02 August, 2003).

[154] This kind of activities by the master and mariners led to the first British legislation, *Responsibility of Shipowners Act* of 1734, 7 Geo. 2, c.15.

[155] See online: The UK P&I Club Homepage <http://www.ukpandi.com/> (date accessed: 30 Nov.2001).

[156] See 92FUND/A.6/4; 92FUND/WGR.3/9/7.1.9. p 13.

[157] Steven J. Hazelwood, *P&I Clubs: Law and Practice*, (2nd ed.) (London: Lloyd's of London Press Ltd., 1994) at 361.

It is noteworthy that the limitation principle is incorporated into some other areas of law such as nuclear damage liability[158] and aviation liability.[159] However, liability for nuclear accidents is much higher than that for oil pollution.[160] For aviation liability, although there are limitation provisions in the Warsaw Convention, the International Air Transport Association (IATA) in 1996 drafted a series of inter-carrier agreements in which the carriers voluntarily waived the damages limitations of Article 22 of the Warsaw Convention.[161] All American and most of the other international carriers have signed the 1996 IATA Inter-carrier Agreements.[162] Under the IATA agreements, passengers can obtain full compensation from the carrier without the need to prove the carrier's "willful misconduct".[163] In addition, even when a carrier is not a signatory to the 1996 IATA Inter-carrier Agreements, its right to limitation is lost if its negligence or other wrongful act or omission caused the incident. Besides, a new convention[164] was adopted in Montreal in 1999 to replace the Warsaw Convention. The new convention, when comes into force, will do away with the right of limitation for passengers' injury and death.[165]

---

[158] Convention on Third Party Liability in the Field of Nuclear Energy (1960), (Paris Convention), 956 U.N.T.S. 251; Vienna Convention on Civil Liability for Nuclear Damage (1963), 1063 U.N.T.S. 265, 2 I.L.M. 727 (1963). A supplementary convention was adopted by the parties to the Paris Convention to increase the liability amount to SDR 300 m. See Raul A.F. Pedrozo, "Transport of nuclear cargoes by sea" (1997) 28 Journal of Maritime Law and Commerce, 207 at 232-3 [hereinafter Pedrozo].

[159] The Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929", 49 Stat 3000, T.S. No. 876, 137 L.N.T.S 11.

[160] The maximum liability is SDR 300 m. *Ibid.* Compensation is provided in three tiers: (1) the first 5 million by compulsory insurance or other financial security; (2) the next 170 million by public funds; and, (3) the last 125 million by public funds contributed jointly by all the Parties to the Brussels Supplementary Convention. Pedrozo, *supra* note 158 at 233.

[161] Blanca I. Rodriguez, "Recent Developments in aviation liability law" (2000) 66 Journal of Air Law and Commerce 21 at 35.

[162] *Ibid.*

[163] *Ibid.*

[164] Convention for the Unification of Certain Rules for International Carriage by Air, 1999, International Civil Aviation Organization Doc. 9740 [hereinafter Montreal Convention].

Most shipowners are now corporations. Their liability is limited to the assets of the corporations. Limitation of liability thus gives them double protection, as this would not only protect the personal assets of the shipowners (directors and shareholders) but also the remaining assets of the corporation from claims to which they would otherwise be subject.[166] Therefore, with the universal use of the corporate device, the economic importance of limitation is less now than it once was.[167]

The limitation principle is also at odds with the basic principle of tort liability namely the principle of *restitutio in integrum* i.e.; restoring a person to his or her original position. Compensation should put a person into the same position as if the tort not happened. Simply put, a victim should get full compensation as far as money can do so. This is not always possible where the limitation principle applies. A plaintiff would not be fully compensated in limitation cases where damages exceed the limitation amount.

In addition, the argument of financial burden on a wrongdoer arising from an award of excessive damages is not accepted in non-maritime cases. A defendant's financial position should not be the determining factor in fixing the liability for damage arising from its act or omission. For example, in *Lim* v. *Camden Health Authority*,[168] Lord Scarman stated,

> "...the principle of law is that compensation should as nearly as

---

[165] Article 21 of the Montreal Convention provides that a carrier will be strictly liable SDR 100,000 for each passenger's bodily injury or death. If the carrier can prove its non-negligence or that the damage was solely due to third-party fault, it can be exonerated for any excess liability over SDR 100,000. However, for the SDR 100,000 the carrier is not absolutely liable as it can still invoke the defense of passenger's contributory negligence.

[166] Gilmore and Black, *supra* note 78 at 818.

[167] *Ibid.*

[168] [1980] A.C.174, 187 (House of Lords).

> possible put the party who has suffered in the same position as he would have been in if he had not sustained the wrong. There is no room here for considering the consequences of a high award upon the wrongdoer or those who finance him."

In conclusion, it is submitted that the justification for the retention of a system of limited liability in maritime claims is weak. In *The Bramley Moore,*[169] Lord Denning said that shipowner's right to limit liability 'is not a matter of justice, it is a rule of public policy which has its origin in history and its justification in convenience'. Even when we consider the capacity of insurance market as a valid argument, it does not necessitate the application of limitation principle. Shipowners should be required to carry the proof of financial guarantee up to the available insurance limit. Any liability beyond the insurance limit, if it ever arises, should be met from the assets of the shipowners.

---

[169] [1963] 2 Lloyd's Rep. 429, at p.437 (Court of Appeal).

CHAPTER TWO

OIL POLLUTION LIABILITY UNDER THE COMMON LAW

Under the common law, an action for oil pollution liability can be brought in negligence, trespass or nuisance, depending on the particular circumstances of a case. Although presently, the international oil pollution regime is based on strict liability thus making it unnecessary to prove a specific tort, common law remains relevant in incidents of oil pollution falling outside the international regime. For example, if the spilled oil is 'non-persistent oil',[170] or if an incident occurs outside the geographic area covered under the international Conventions,[171] or if the source of oil pollution is from an offshore installation,[172] the common law remains applicable.[173] In addition, though the statutory strict liability regime does not require a plaintiff to prove any specific tort on the part of a shipowner, the plaintiff may still have to prove a test of proximity that is based on the common law of torts i.e., that the damage is not "too remote from the causal factor which makes the causer liable."[174]

---

[170] Under Article I (5) of Liability Convention "Oil" is defined to mean "any persistent hydrocarbon mineral oil such as crude oil, fuel oil, heavy diesel oil and lubrication oil...". Persistent oil is not defined in the Conventions. In *IOPC Compensation Fund 1992 Claims Manual* (2000) at 6 [hereinafter *Claims Manual*] non-persistent oil is defined as oil which at the time of shipment at least 50% of the hydrocarbon fractions, by volume, distil at a temperature of 340 degree C (645 degree F), and at least 95% of the hydrocarbon fractions, by volume, distil at a temperature of 370 degree C (700degree F), when tested in accordance with the American Society for Testing and Materials' Method D86/78 or any subsequent revision thereof.

[171] Article II of the Liability Convention provides that the Convention applies exclusively to pollution damage in the territory, including the territorial sea, and in the exclusive economic zone, of a Contracting State.

[172] Because the Liability Convention and Fund Convention apply only to ship-source oil pollution, while the American Oil Pollution Act of 1990 (hereinafter the OPA 1990) covers ship, onshore and offshore facilities.

[173] This is true for Common law countries.

[174] Per Lord McCluskey in *Landcatch Ltd.* v. *International Oil Pollution Compensation Fund* [1999] 2 Lloyd's Rep. 316 at 335 (Scotland Second Division Inner House Court of Session).

The purpose of this chapter is to examine the applicability of common law[175] in oil pollution cases, notwithstanding the special liability regimes that are in force in many common law countries by virtue of their ratification of international conventions or through the adoption of their own statutory regime. In doing so, I will examine in Part I the various causes of action applicable in an oil spillage case. Part II briefly describes the basic principles of compensation and causation. Part III outlines possible heads of damages following an oil spill. The chapter concludes that common law fails to remedy all oil pollution victims due to the existence of many requirements, exceptions and exclusionary principles.

I. Various Causes of Action in Common Law

A. Negligence

Negligence is the most commonly used tort for oil pollution liability as the majority of oil pollution incidents are unintentional. If oil spills are intentional, actions could arise either in trespass or nuisance. Negligence is "the breach of a legal duty to care which results in damage, undesired by the defendant, to the plaintiff."[176] An action in negligence is based on three elements which are that

(1) the defendant owes a duty of care to plaintiff;

(2) the defendant breaches that duty and

(3) as a result of the breach, plaintiff suffers damage.

---

[175] The discussion will mainly be confined to Canadian, British and American common law.

[176] W.V.H. Rogers, *Winfield & Jolowicz on Tort*, 15th ed. (London: Sweet & Maxwell, 1998) at 90 [hereinafter *Winfield*].

A duty of care arises when there is a relationship of proximity between two persons such that it is foreseeable that one's careless act or omission would cause injury or damage to the other. The duty of care is explained by Lord Atkin in *Donoghue* v. *Stevenson*,[177]

> "You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be - persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."[178]

This statement came to be known as 'neighbor' principle. Lord Atkins' neighbor principle was later enunciated by Lord Wilberforce when he set out a two stage test in *Anns* v. *Merton London Borough Council*.[179] The first stage imposes a *prima facie* duty of care as long as there is the relationship of proximity based on foreseeability. The second stage limits or negates that duty if there is any policy reason to do so, such as the policy not to provide compensation for pure economic loss. The Supreme Court of Canada adopted this test in *Kamloops (City)* v. *Nielsen*,[180] even though the House of Lords later in *Peabody Donation Funds Govs.* v. *Sir Lindsay Parkinson & Co.*[181] and the Privy Council in *Yuen Kun-yeu* v. *A.G. Hong Kong*[182] rejected the two stage test. The English courts now favor a one stage test where the policy consideration is merely a factor, not an independent stage, in imposing any duty of care. It is not clear whether the two stage test makes any difference in the ultimate duty of care other than initially broadening the scope of the duty.[183]

---

[177] [1932] A.C. 562 (H.L.).
[178] *Ibid.* at 580; per Lord Atkin.
[179] [1978] A.C. 728 (H.L).
[180] [1984] 2 S.C.R. 2 (S.C.C.).
[181] [1985] A.C. 210 (H.L.).
[182] [1987] 2 All E.R. 705 (P.C.).

In an American oil pollution case, *Union Oil Co.* v. *Oppen*,[184] a duty of care was found to exist between drilling operators and commercial fishermen, as it was held to be foreseeable that negligence on the part of the former would cause diminution in the aquatic life of the sea and thus injure the fishermen's business.[185] To hold that such damage is unforeseeable is "to suppose a degree of general ignorance of the effects of oil pollution not in accord with good sense",[186] as the dangers of oil pollution are "known even by school children."[187] Similarly, a shipowner also owes a duty to fishermen and other sea users not to pollute the sea as it is foreseeable that oil pollution from ships would cause damage to the fishermen's property and would affect their business.

The burden of proof in negligence is on the plaintiff unless it is a situation where the doctrine of *res ipsa loquitur* applies. The doctrine applies when it is "so improbable that such an incident would have happened without the negligence of the defendant."[188] The doctrine shifts the burden of disproving negligence to the defendant.[189]

Negligence was an issue in the oil spill case of the *Southport Corporation* v. *Esso Petroleum Company Ltd.* [hereinafter *Southport Corporation*].[190] The essential facts of the case are provided here as the case will be referred to throughout the thesis. The ship

---

[183] See L.N. Klar, *Tort Law*, 2nd ed. (Toronto: Carswell, 1996) at 131-145 [hereinafter Klar].

[184] (1974), 501 F. 2d 558 (9th Cir.), where oil spill from the defendants' drilling operation resulted in the reduction of the commercial fishing.

[185] The case relates to pure economic loss. Pure economic loss is not generally recoverable in Canada and the UK. For the detail discussion of economic loss, see *infra* 'Economic Loss' at 55.

[186] *Ibid.* at 569.

[187] *Ibid.*

[188] *Osborn's Concise Law Dictionary*, 7th ed., (Delhi: Universal Law Publishing Co. Pvt. Ltd., 1997) at p.288.

[189] *Swan* v. *Salisbury Construction Co* [1966] 1 W.L.R 204 (Privy Council).

[190] [1953] 2 Lloyd's Rep. 414 (Trial Div.); [1954] 1 Lloyd's Rep. (Court of Appeal.) 446; [1955] 2 Lloyd's Rep 655 (House of Lords).

Inverpool developed a steering fault. The master weighed the advantages and disadvantages of turning back or proceeding in bad weather and finally decided to proceed. The vessel ran aground. To save the vessel and the crew from the danger, the master jettisoned 400 tones of fuel oil in order to lighten the vessel. The discharged oil became deposited on a foreshore and lake owned by the plaintiffs. The plaintiffs alleged negligence in the master's decision to proceed despite his knowledge of the erratic steering. The trial court found and the House of Lords agreed that there was no negligence on the master's part as his decision was not a "careless and unskillful one."[191] In the trial judge's opinion, the master carefully considered the two evils and thought that the lesser of the two would be to continue moving forward.[192] The plaintiffs failed therefore to discharge the burden of proving of negligence and the claim was dismissed.

Conversely, the Court of Appeal had held that the facts of the case do speak for itself. The ship was grounded due to defect in steering. The defect in steering was due to fractured stern. The cause of the fracture was unknown. The Court of Appeal was of the opinion that the seas were not rough enough to fracture the stern frame and that there must have been some fault on the part of the master. The Court of Appeal applied the doctrine of *res ipsa loquitur* and held that the onus was shifted from the plaintiffs to the defendants to show that the fracture of the stern frame occurred without any negligence on their part. As they failed to do so, the judgement was given in the plaintiffs' favour. The House of Lords reversed the Court of Appeal's decision and affirmed the judgement of the trial court.

---

[191] [1953] 2 Lloyd's Rep. 414 at 424 (Trial Dev.).
[192] *Ibid.*

It is noteworthy here that the plaintiffs alleged negligence, trespass and nuisance (both public and private). The trial court did not find the defendants liable for any of the torts.[193] The Court of Appeal held the defendants liable for negligence[194] and public nuisance.[195] However, the House of Lords reversed the Court of Appeal decision and affirmed the trial judge's decision.[196] In the process of the delivering the judgements, the courts at all levels discussed various issues relating to different causes of action. The issues will be mentioned below at the discussion of the relevant causes of action.

B. Trespass

Trespass is another tort upon which a claim for damages may lie in an oil pollution liability situation. It is an "unjustifiable interference with the possession of land."[197] It differs from negligence in at least two ways:

(1) It is actionable *per se* (actionable without proof of actual damage) and

(2) It is an intentional tort (there must be an intention to enter upon the land, not necessarily a criminal intention).[198]

In an oil pollution case, it would be trespass to discharge oil intentionally on the plaintiff's land, private beach or foreshore. Plaintiffs need not have legal title to land in order to claim damages under trespass, all that is required is that the defendant interferes with the 'possession of land'.[199] It is not also necessary for the plaintiff to show that the defendant intended to interfere with the possession of the plaintiff's land;[200] a mistaken intention would suffice.[201]

---

[193] The plaintiffs alleged nuisance (both public and private), negligence and trespass. See trail court's decision; *supra* note 182 at 420-21 for nuisance, 421-23 for trespass and 423-25 for negligence.

[194] See Court of Appeal decision; *supra* note 190 at 457-58.

[195] *Ibid.* at 455-56.

[196] [1955] 2 Lloyd's Rep 655 (H.L.).

[197] *Winfield, supra* note 176 at 472.

[198] See generally *ibid.* pp.472-473.

Although trespass is actionable *per se*, a plaintiff normally files an action when there is actual damage on its property as a result of the defendant's unlawful interference. In a "no damage" situation, an action in trespass is generally brought for reasons other than obtaining damages, such as to deter the defendant from further interference or to settle a dispute with regard to ownership or an easement right on a disputed land.[202] In an oil spill case, an action in trespass, if successful, will normally be for physical damage to a beach or foreshore caused by contamination of oil.

Trespass is an intentional interference. When oil is discharged deliberately, although this situation is quite rare, an action would lie in trespass. When, on the other hand, the discharge is accidental, which is normally the case, the plaintiff has to prove negligence in order to get a favorable verdict. Diplock J. in *Fowler* v. *Lanning*[203] discussed this condition and said that 'trespass to the person does not lie if the injury to the plaintiff ... was caused unintentionally and without the negligence on the defendant's part.'[204] Similarly, Lord Denning MR in *Letang* v. *Couper*[205] comments that,

---

[199] See Klar, *supra* note 183 at 85-7.

[200] In oil pollution case, it would be the intention to discharge oil, not necessarily on the particular plaintiff's land.

[201] "Trespass does not depend on intention. If I walk upon my neighbour's land, I am a trespasser even though I believe it to be my own...." Per Rand J. in East Crest Oil Co. v. R., [1945] S.C.R. 191 at 195; cited in Klar *supra* note 183 at 84, note 366. See also *Turner* v. *Thorne*, (1959) 21 D.L.R. (2d) 29 (Ont. H.C.), where parcels were mistakenly delivered to the plaintiff's house, over which he fell and injured himself, it was held to be trespass; cited in *ibid.* at 84-5.

[202] See *Winfield, supra* note 176 at 473.

[203] [1959] 2 W.L.R. 249 (Queen's Bench Division).

[204] *Ibid.*

[205] [1965] 1QB 232 (Court of Appeal).

> "If one man intentionally applies force directly to another, the plaintiff has a cause of action...in trespass to the person.... If he does not inflict injury intentionally, but only unintentionally, the plaintiff has no cause of action today in trespass. His only cause of action is negligence...."[206]

Although the above two cases relate to trespass to the person, the same principle applies in cases of trespass to land.[207] In the *Southport Corporation* case, the discharge was intentional, as the master jettisoned the oil in order to lighten the grounded ship so that it could move.

To amount to trespass, it must be a direct interference with the plaintiff's land. This element distinguishes trespass from private nuisance. If an alleged interference is consequential, it is private nuisance, not trespass. The line between direct and consequential interference is very thin. For example, the encroachment of a tree's root from the defendant's land to the plaintiff's was held to be consequential, not direct interference.[208] On the other hand, throwing a stone on the plaintiff's land was held to be direct interference.[209]

In an oil pollution case, the discharge of oil may never be direct in the sense required by trespass, as it almost always occurs on water, from where it spreads on to the beach, foreshore or private lake. When oil is carried to land without the help of any third force, like the wind, waves, tides or currents, the interference is direct. If, on the other hand, any of these natural forces takes the discharged oil to the plaintiff's land or property, it is consequential interference. The distinction between direct and consequential interference led Denning LJ. in *Southport Corporation* to hold that the discharge of oil on the plaintiff's property was not trespass because the "discharge of oil was not done directly onto their foreshore, but outside the estuary. It was carried by the tide onto their land, but that was only consequential, not direct."[210] Lord Tucker in the House of Lord agreed with Denning LJ on this point,[211] although the House of Lords did not hold the defendants liable for any of the alleged torts.

---

[206] *Ibid.* at 239.

[207] See David W. Abecassis, *The Law and Practice relating to Oil Pollution from Ships* (London: Butterworths, 1978) at 112-113 [hereinafter Abecassis].

[208] *Davey* v. *Harrow Corp.* [1957] All ER 305 (Court of Appeal).

[209] *Mann* v. *Saulnier* (1959) 19 D.L.R. (2nd)130 (N.B.C.A.).

The difficulties involved in proving all the aforementioned elements make trespass an unattractive cause of action for oil pollution damage. Even where a plaintiff proves all these elements, an action in trespass may still fail because of many available defenses to trespass such as consent (license), necessity and legal justification.[212]

The defense of necessity is applicable to the cases of intentional discharge of oil. To succeed in this defense, the defendant must prove that the discharge of oil was to save human life. The defendants in the *Southport Corporation* case relied on the defense of necessity. Devlin J. (at trial) allowed the defense,[213] stating that although the plaintiff had a good cause of action in trespass and nuisance, the defendants were protected by the defense of necessity because the oil was discharged to save the life of the crew.

The defense of necessity would be inapplicable in a situation where spillage of oil occurs due to negligence of a shipowner. As discussed earlier in the above case, both the trial court and the House of Lords found no negligence prior to the necessity or emergency. Similarly, the defense would not be tenable if oil is discharged only for the safety of the ship at the expense of damage to the plaintiff's property. A defendant cannot damage the property of another solely to protect its own property. However, in the *Southport Corporation* case, the safety of human beings was at stake and "the safety of human lives belongs to a different scale of values from the safety of property."[214] It must be noted that Denning LJ. held that the initial problem, fracturing of the stern, could not have been caused without any negligence on the part of the shipowner. In his view, the weather was not rough enough to fracture the stern and since the shipowner failed to prove otherwise, the defense of necessity was inapplicable.[215]

---

[210] [1954] 1 Lloyd's Rep. 446 at 455 (Court of Appeal).

[211] [1955] 2 Lloyd's Rep 655 at p.667 (H.L). Per Lord Tucker, "I am inclined to agree with Lord Justice Denning that trespass does not lie on the facts of this case, as the discharge of the oil was not done directly on to the foreshore but outside in the estuary."

[212] *Winfield, supra* note 176 at 480-4.

[213] [1953] 2 Lloyd's Law Reports 414 at 422.

Another defense, referred to as 'traffic rule',[216] was applied in the above case. The rule states that a person whose land or property adjoins a highway "cannot complain of damage done by persons using the highways unless it is done negligently".[217] The seas, public navigable waters, were compared to public highway and since the plaintiffs could not prove negligence, as decided by the trial court and the House of Lords, they had to put up with damage caused by the non-negligent users of the seas. It is questionable whether the application of the rule to maritime cases was appropriate.[218] The rule was originally applied to impose the risk of liability on the owners or occupiers of land or property adjoining a public road or highway who could protect their property from 'straying cattle or bolting horses' by fencing but chose not to do so. In a sea pollution case, similar protection such as fencing is not feasible, or even possible, for property or land near the sea or on the sea. Therefore, the rule should not have been applied in marine pollution cases.

---

[214] Per Devlin J., *Ibid.* at p. 422.

[215] Through the principle of vicarious liability for the fault of master or crew.

[216] Abecassis, *supra* note 207 at 114.

[217] Per Devlin J. in *Southport Corporation* [1953] 2 Lloyd's Rep.414 at 421.

[218] Abecassis, *supra* note 200 at 114-115.

C. Public Nuisance

Nuisance can also be pleaded in an oil pollution liability case. Nuisance in common law is divided into two categories: public nuisance and private nuisance. Public nuisance involves causing discomfort or inconvenience to a class of public. An individual member of public can bring a civil action for public nuisance only when he or she suffers special damage over and above that suffered by the public. An oil spill at sea is generally considered as public nuisance. In *R.* v. *The Ship "Sun Diamond"*,[219] discharge of fuel oil from a ship in and around the port of Vancouver following a collision with another ship was held to be public nuisance.

When oil pollution causes nuisance to a class of the public, without any special damage to an individual, no individual among the affected public has *locus standi* to bring an action against the polluter. Only the Attorney General or a member of affected public with the permission of the Attorney General in a relator action can sue the defendant. The reason behind this rule is that many people may be affected by a particular nuisance and to allow each of them to bring an action "would lead to harsh results".[220] Yet, sometimes adherence to this rule might cause even harsher results when the Attorney General refuses to bring an action for one reason or another, such as the involvement of a government agency in the alleged nuisance. Although some judges have criticized the rule,[221] nevertheless, it still remains the law.

---

[219] [1984] 1 F.C. 3; 1983 F.C. LEXIS 172: 25 C.C.L.T. 19 (Federal Court).

[220] *Winfield, supra* note 176 at 493.

[221] In the words of Lord Diplock , "It would, in my view, be a grave *lacuna* our system of public law if a pressure group, like the federation, or even a single public – spirited taxpayer, were prevented by outdated

Nuisance can be physical and non-physical or intangible. In oil pollution cases, when there is physical damage to navigable water by the contamination of spilled oil, public nuisance can easily be established as it materially affects "the reasonable comfort and convenience of life of a class of Her Majesty's subjects".[222] In the *Southport Corporation* case Denning, L.J. stated,

> "...it is, in my opinion, a public nuisance to discharge oil into the sea in such circumstances that it is likely to be carried on to the shores and beaches of our land to the prejudice and discomfort of Her Majesty's subjects. It is an offence punishable by the common law. Furthermore, if any person should suffer greater damage or inconvenience from the oil than the generality of the public, he can have an action to recover damages on that account...."[223]

Intangible nuisance from oil spill can occur when the spilled oil has offensive odour causing discomfort to persons who use the affected navigable water, sea-beaches or beach resort hotels.

To amount to public nuisance, annoyance or discomfort must be to a class of the public, not merely to one or two persons among the public. In *Attorney General* v. *PYA Quarries Ltd*,[224] Denning LJ said, "when the nuisance is so concentrated that only two or three property owners are affected by it... then they ought to take proceedings on their own account to stop it and not expect the community to do it for them."[225] The determination of the number of persons that constitute a class of public is usually a question of fact. The answer to this question lies in common sense and is decided

---

technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped". *R* v. *Inland Revenue Commissioners* [1982] A.C 617 at 644 (H.L.).

[222] *Attorney General* v. *PYA Quarries Ltd* [1957] 2 Q.B. 169 at p. 184 per Romer, L.J (Court of Appeal).

[223] [1954] 1 Lloyd's Rep. 446 at 456 (Court of Appeal).

[224] [1957] 2 Q.B. 169 (Court of Appeal).

[225] *Ibid* at 191.

according to the particular facts and circumstances of each case.[226]

A plaintiff, who brings a claim for damages under public nuisance, must prove special damage. Special damage is damage or inconvenience beyond that suffered by general public.[227] Special damage is often very restrictively defined in the Canadian case law. For example, in *Hickey et al* v. *Electric Reduction Co. of Canada, Ltd.*,[228] where the livelihood of fishermen was affected due to the destruction of fish following the discharge of poisonous materials in Placentia Bay, it was held that the damage was not peculiar to the plaintiffs. The right to fish in the sea and public navigable waters is free and open to all and can be exercised by any member of the public.[229] The fishermen's injury is merely different in degree, not different in kind from that suffered by the general public.[230] Therefore, the injury to the plaintiff fishermen was not "particular direct and substantial, over and above the injury thereby inflicted upon the public in general."[231]

Both the American and English courts adopt a wider interpretation of 'special damage'. In the United States, the right of commercial fishermen to recover for injuries to their businesses caused by pollution of public waters has been recognized in many cases.[232] Their loss is held to be "of a particular and special nature, limited to the class of commercial fishermen which they represent."[233] In *Tate & Lyle Indust. Ltd.* v. *Greater*

---

[226] See *Winfield*, *supra* note 176 at 992.
[227] Guaci, *supra* note 30 at 11.
[228] 21 D.L.R. (3d) 368 (Nfld Supreme Court, 1970).
[229] *Ibid.* at 371.
[230] *Ibid.* at 372.
[231] Per Kent J. in *McRae* v. *British Norwegian Whaling Co., Ltd.*, [1927-31] Nfld. L.R. 274 at 283-4; cited in the above case at 371.
[232] See *Masonite Corporation* v. *Steede*, 198 Miss. 547, 23 So. 2d 756 (Supreme Court of Mississippi 1945); *Hampton* v. *North Carolina Pulp Company*, 223 N.C. 535, 27 S.E. 2d 538 (Supreme Court of North Carolina 1943); Prosser, "Private Action for Public Nuisance", (1966)52 Va. L. Rev. 997 at 1013-16.
[233] *Union Oil Co.* v. *Oppen* (1974), 501 F. 2d 558 (9th Cir.) at 570.

London Council,[234] the House of Lords found that special damage existed where the defendants' construction of ferry terminals on public navigable waters caused siltation and thus obstructed vessels coming to plaintiffs' jetties for loading and unloading sugars.

When pollution causes personal injury or damage to a plaintiff's private property, there is no difference in Canadian and English jurisprudence on special damage suffered by the plaintiff, over and above that suffered by the public.[235] In *Blanchard* v. *Cormier*,[236] effluent from a fish processing plant caused discoloration of waters in a bay in front of the plaintiff's property. The plaintiff's property became unsuitable for sunbathing, swimming and scuba diving. The New Brunswick Court of Appeal found that there was special damage to the plaintiff and allowed the action for public nuisance. Similarly, in *Southport Corporation*, Denning L.J. upheld a finding of public nuisance on the ground that the plaintiffs suffered special damage because their foreshore and lake were contaminated by oil.

As in negligence, foreseeability of damage is a condition precedent to recovery of damages in nuisance. In *Wagon Mound (No.2)*,[237] where a vessel was damaged by fire following a discharge of oil from another vessel, the Privy Council held that the test of foreseeability had to be satisfied not only in negligence but in nuisance as well.[238] The law in this regard was not well established until the Privy Council's decision in the

---

[234] [1983] 2 A.C. 509 (H.L.).

[235] If injury to private property is required to bring a civil action in public nuisance, a question arises why one needs to bring an action in public nuisance as he will also have a cause of action in private nuisance as long as the injury is to his land.

[236] (1980), 112 D.L.R. (3d) 667 (N.B.C.A.).

[237] [1967] 1 AC 617 (Privy Council).

[238] The Canadian courts also hold the similar view. See *Hickey et al* v. *Electric Reduction Co. of Canada, Ltd.*, 21 D.L.R. (3d) 368 at 373 (Nfld Supreme Court, 1970).

Wagon Mound (No. 2), [239] as is evident from Walsh J.'s decision of the case in the Supreme Court of New South Wales,[240] when he held that unforeseeability of the fire damage to the plaintiff's ship did not affect the defendant's liability in nuisance. According to him, foreseeability is not a prerequisite to nuisance.

In an oil pollution case, fire damage to a wharf following the discharge of oil was held to be an unforeseeable event in the *Wagon Mound (No. 1)*, but fire damage to another vessel was held to be a foreseeable consequence in *Wagon Mound (No. 2)*. Therefore, it still remains uncertain what the courts' response would be in future cases of fire damage pursuant to an oil spill. The long term unknown effects on the sea, the environment or human life following an oil spill may be regarded as unforeseeable consequences.

A foreseeable consequence is not necessarily synonymous with a known consequence. Unforeseeability is also used sometimes to mean remoteness. For example, when a fish exporter, who buys the fish from fishermen in an affected area, suffers loss, the loss can easily be contemplated. Yet the loss may still be denied as too remote a consequence of the oil pollution. In *Landcatch Ltd* v. *IOPC Fund*,[241] the plaintiffs' salmon business was affected by an oil spill incident. They could not sell smolts (young salmon) to salmon farmers, as the farmers could not use seawater for salmon farming after the oil spill. It was held that the plaintiffs' loss was a very remote consequence of the oil spill.

---

[239] See *Cambridge Water Co* v. *Eastern Counties Leather plc* [1994] 2 AC 264 (H.L.).

[240] [1963]1 Lloyd's Rep.403 (Supreme Court of New South Wales).

[241] [1999] 2Lloyd's Rep. 316 (Scotland Second Division Inner House Court of Session). For details, see *infra* 'relational economic loss'.

Unlike negligence, a plaintiff in a nuisance action dose not have to prove any fault or reckless behavior on the part of a defendant. It is the result of the defendant's act on the plaintiff which is important in nuisance, not the act itself.[242] The plaintiff only has to show that he suffered nuisance, discomfort or special damage. The burden then shifts to the defendant to justify the action or inaction that resulted in the nuisance. In *Southport Corporation*, Denning LJ said,

> "One of the principal differences between an action for a public nuisance and an action for negligence is the burden of proof. In an action for a public nuisance, once the nuisance is proved and the defendant is shown to have caused it, then the legal burden is shifted on the defendant to justify or excuse himself."[243]

However, in *Wagon Mound (No. 2)*,[244] it was held that "although negligence may not be necessary, fault of some kind is almost always necessary"[245] for a private party to recover damages under public nuisance. The Canadian courts have on few occasions required negligence to prove public nuisance.[246] However, oil spill cases are held to be public nuisance without any regard to the negligence element.[247]

D. Private Nuisance

Private nuisance is an "unlawful interference with a person's use or enjoyment of land, or some right over, or in connection with it."[248] Private nuisance differs from public nuisance in terms of the plaintiff's interest in land. In private nuisance the plaintiff must have some interest in land, which is interfered with. No interest in land is necessary for public nuisance;[249] the plaintiff only has to prove special damage over and above that suffered by general public. In oil pollution cases, where the damage occurs on the foreshore[250] or on installations such as a wharf,[251] this will undoubtedly be interference with land. If a floating object, such as a boat, a ship or a submerged object like a fishing net is damaged, it is doubtful whether a case of private nuisance can be established, as these items cannot be termed as land because they are neither immoveable nor permanently affixed to the surface of land.[252] However, people residing near the seas may bring an action in private nuisance for bad smells and odors emanating from spilled oil on the seas, even though their land is not contaminated by oil.[253]

---

[242] J.G. Fleming, *The Law of Torts*, 9th ed. (Sydney: LBC Information Services, 1998) at 458 [hereinafter Fleming].
[243] [1954] 1 Lloyd's Rep. 446 at 456 (Court of Appeal).
[244] [1966] 2 All E.R. 709 (P.C.).
[245] *Ibid.* at 716.
[246] See *Ross* v. *Wall*, (1980), 14 C.C.L.T. 243 (B.C.C.A.), and *Assie* v. *Sask. Telecommunications*, (1978), 7 C.C.L.T. 39 (Sask. C.A.); cited in Klar *supra* note 183 at 530.
[247] "There appears to me to be little doubt that an oil spill constitutes a public nuisance…." Per Walsh J. in *R.* v. *The Ship "Sun Diamond"*, (1984) 1 F.C. 3; 25 C.C.L.T. 19 (Federal Court).

It remains unsettled whether interference must originate from land in order for a plaintiff to succeed in an action for private nuisance. If interference must originate from land, an action for oil pollution from ships may never lie in private nuisance as the source of nuisance is not land. This was the position taken by Denning LJ[254] in the *Southport Corporation* case with regard to private nuisance and Lord Radcliffe in the House of

---

[248] *Winfield*, *supra* note 176 at 494.

[249] Without any interest in land, 'special damage' requirement may be hard to prove in Canadian courts. See *supra* discussion on 'special damage' under Public Nuisance.

[250] *Southport Corporation, supra* note 190.

[251] *Wagon Mound (No.1)* [1961] AC 388 (P.C).

[252] Land is an "immovable and indestructible three-dimensional area consisting of a portion of the earth's surface, the space above and below the surface, and every thing growing on or permanently affixed to it". B.A. Garner, ed. *Black's Law Dictionary*, 7th ed. (St. Paul, MN: West Publishing, 1999) at 881.

[253] The smell must be very strong and intolerable. "It is certainly not every smell, whiff of smoke, sound of machinery or music which will entitle the indignant plaintiff to recover." Per McIntyre J.A. in *Royal Anne Hotel Co.* v. *Ashcraft* (1979), 8 C.C.L.T. 179 at 186 (B.C.C.A.); cited in Klar, *supra* note 183 at 536.

[254] [1954] 1Lloyd's Rep. 446 at 455 (C.A).

Lords concurred.[255] On the other hand, most judges and academic writers[256] do not consider this as a precondition of private nuisance. Rather, they argue that the interference must be with the plaintiff's land and not necessarily from the defendant's land. For example, in the *Southport Corporation* case, Devlin J. held that he knew of "no principle that it [nuisance] must emanate from land belonging to the defendant".[257] The preponderance of cases supports this view.[258]

As both private nuisance and trespass are interferences with land, they are differentiated on the basis of the directness of the interference. In trespass, the interference must be direct, while indirect interference would establish a cause of action in private nuisance. At times the distinction may seem very thin and confusing;[259] nevertheless, it is the commonly used criterion to distinguish private nuisance from trespass. As discussed earlier,[260] when the discharge of oil occurs directly on the plaintiff's property, it is trespass. If the wind, tide, wave or the current carries the oil onto the plaintiff's property, it is private nuisance.

Whatever is said about public nuisance with regard to foreseeability and burden of proof is equally applicable to private nuisance. Although the *Wagon Mound (No. 2)*[261] is a case of public nuisance, there are *dicta* in the case to the effect that foreseeability is also a prerequisite to the recovery of damages in private nuisance.[262]

---

[255] [1955] 2 Lloyd's Rep. 655 at 666 (H.L.).

[256] *Winfield, supra* note 176 at 554-555.

[257] [1953] 2Lloyd's Rep.414 at 420 (Trial Dev.).

[258] *Smith* v. *Great Western Rly and Anglo-American Oil Co* (1926) 135 LT 112 (leakage of oil from a *railway tank* was held to be nuisance); *Newman* v. *Conair Aviation Ltd* (1972) 33 DLR (3d) 474 (spraying crops from *plane* was held to be nuisance) (B.C. Supreme Court). [These cases are cited in Abecassis, *supra* note 207 at 121 in footnote19].

[259] See *ibid.* discussion on 'Direct interference' with regard to trespass.

[260] *Ibid.* in the discussion on trespass.

[261] *Overseas Tankship (U.K.) Ltd.* v. *Miller Steamship Co. Pty. (The Wagon Mound (No. 2))* [1967] 1 A.C. 617, (P.C).

E. Strict Liability

Although strict liability may not be considered as an independent category of tort different from nuisance,[263] the decision in *Rylands* v. *Fletcher*[264] has placed it in a special position in the classification of torts. Blackburn J. laid down the rule thus,

> "...the person who for his own purposes brings on his lands and collects and keeps there any thing likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape."[265]

In the House of Lords' decision on the same case,[266] Lord Cairns added a new requirement of 'non-natural use' of land. Although Lord Cairns was clear about what he meant by non-natural use of land, the requirement caused a lot of confusion in later cases. To Lord Cairns, bringing any thing which was not naturally present on a parcel of land, but was brought later on, is a non-natural use of the land. For example, water which was on the land as a result of natural gravitation is natural use of the land, while water brought there is non-natural use of the land.[267] Some courts interpreted the term 'natural use' restrictively while others used it broadly. The narrower interpretation focuses on the initial use of the escaped thing, while the broader interpretation looks at the consequence when it escapes. In the first approach, if the initial use of land is for ordinary purposes, the later unexpected danger resulting from it will not make the use non-natural. The broader approach determines this requirement based on the subsequent damage.

---

[262] [1967] AC 617 at 636-637 and 638-640.

[263] See generally *Winfield, supra* note 176 at 538-543.

[264] (1866) L.R. 1 Ex. 265 (Court of Exchequer Chamber); (1868) L.R. 3 H.L. 330 (House of Lords).

[265] (1866) L.R. 1 Ex. 265 at 279-280.

[266] (1868), L.R. 3 H.L. 330. See Klar, *supra* note 183 at 456-460.

[267] *Ibid.*

Canadian courts have adopted both approaches. In *Tock* v. *St. John's Metro. Area Bd.*,[268] the plaintiffs' home was flooded due to an obstruction in the storm sewer system. The Supreme Court of Canada held that use of the land for public sewerage and drainage systems was not a non-natural use and therefore *Rylands* v. *Fletcher* did not apply. On the other hand, in *Metson* v. *R.W.DeWolfe Ltd.*,[269] although the use of animal manure was considered as "normal agricultural husbandry", the principle of *Rylands* v. *Fletcher* applied when rains washed it into the plaintiff's well and contaminated his domestic water supply. Looking at the facts of the *Rylands* v. *Fletcher* case, the broader interpretation seems to be closer to the original purpose behind the principle. Blackburn J. considered an activity hazardous or dangerous in terms of its potential damage to neighbouring land, not because the activity itself was dangerous.[270]

In *Rylands* v. *Fletcher*, water is considered as a "thing likely to do mischief if it escapes". Applying the same analogy and ignoring the vague requirement of 'non-natural use', oil may be regarded as a more mischievous substance. When oil escapes, it will ordinarily cause much more serious damage than water and would leave longer lasting effects on the victim, whether human beings or the environment. However, when oil escapes from ships, rather than from land, the courts have yet to determine whether the rule in *Rylands* v. *Fletcher* will apply.[271] Nevertheless, if we consider the rationale behind the rule i.e. protection of property from the damage or discomfort caused by the escape of dangerous substances, it is a better approach to disregard the source of pollution, be it ship or land such as an onshore installation, and to apply the rule to oil pollution in general.

---

[268] (1989) 64 D.L.R. (4th) 620 (S.C.C.).

[269] (1980) 14 C.C.L.T. 216 (N.S.T.D.).

[270] Klar, *supra* note 183 at 455.

[271] In *Read* v. *J. Lyons & Co.*, [1946] 2 All E.R. 471 (H.L.), the House of Lords restricted the application of *Rylands* v. *Fletcher*'s principle to an "escape from a *place* which the defendant has occupation of, or control over, to a *place* which is outside his occupation or control". (Emphasis added). Although Canadian courts applied the principles to cases of escape of gas or water from pipes and underground tanks, these sources can still be termed as land under its legal definition as they are attached to the land. See *Doherty* v. *Allen* (1987), 86 N.B.R. (2d) 361 (Q.B.), affirmed (1988), 55 D.L.R. (4th) 746 (N.B.C.A.); *B.C. Tel.* v. *Shell*

Foreseeability of damage is also a condition precedent in applying the strict liability principle in *Rylands* v. *Fletcher*. The law with regard to foreseeability in strict liability was clarified in the *Cambridge Water Co* v. *Eastern Counties Leather plc,*[272] where it was held that there would be no liability for nuisance if the particular damage could not reasonably have been foreseen. In this case, the defendants had used certain chemicals[273] in their tannery. Huge amounts of this chemical accumulated underground and contaminated the aquifer from which the plaintiffs received their water supply. The plaintiffs had to make alternative arrangements for water at a cost of approximately £1million. The House of Lords held that the defendants were not liable for the contamination because the particular chemical was not known at that time to contaminate water as it is not readily soluble in water and thus the contamination of water was an unforeseeable damage.

It is worthy of mention that in an oil pollution liability case, a shipowner normally becomes liable through the principle of vicarious liability because it is almost always the master or crew of a ship whose negligence causes an oil spill. Under the principle of

---

Can. Ltd. (1987), 13 B.C.L.R. (2d) 210 (S.C.); *Adilman's Ltd.* v. *Bill Boyd's Radio (T.V.) Clinic* (1982), 19 Sask. R. 215 (Q.B.); and *Newell* v. *R.E. Newell Fisheries Ltd.* (1982), 54 N.S.R. (2d) 652 (T.D.); cited in Klar, *supra* note 176 at 461.

[272] [1994] 1 All E. R. 53 (H.L.). "...foreseeability of damage of the relevant type should be regarded as a prerequisite of liability in damages under the rule." Per Lord Goff in *Cambridge Water Co.* v. *Eastern Counties Leather plc.*, at 76 .

[273] PCE, an organochlorine.

vicarious liability, a shipowner is imputed with the liability of the master or crew for the act or omission committed in the course or scope of their employment. In fact, in the *Southport Corporation*[274] case the shipowner was sued under this principle.

II. Principles of Compensation and Causation

A. Basic Principle of Compensation

Once any of the above torts is established, a plaintiff recovers damages for the injury or damage suffered. The basic principle for the measurement of damages is the principle of *restitutio in integrum* (restoration to the original position). This principle is explained as follows:

> Where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get the sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.[275]

Simply put, *restitutio in integrum* means restoring a plaintiff whose rights have been infringed to the position he or she would have been in had the infringement not occurred. The principle works best when the damage or injury is a monetary one or when the damage can be exactly calculated, as in property damage. Real restitution is not possible in case of non-monetary loss or where the damage cannot be exactly calculated, such as damage for pain and suffering or the loss of a limb or the loss of consortium by a spouse. In such situations, courts use the word 'compensation' instead of restitution.[276] A person, who loses an eye or a limb as a result of a negligent incident, may be compensated by money, but it will not restore the eye or limb.

---

[274] [1955] 2 Lloyd's Rep.655 at 665 (H.L.).

[275] *Livingstone* v. *Rawyards Coal Co* (1880) 5 App. Cas. 25 at 39, per Lord Blackburn; cited in *Winfield, supra* note 176 at 757.

In an oil pollution incident, victims generally suffer damage to real property or loss of income with or without damage to personal property. These kinds of loss can normally be calculated in monetary terms. Provided that all the requirements of a particular tort are established, an oil pollution victim is entitled to full compensation under the principle of *restitutio in integrum*.[277] This is a positive aspect of common law, because oil pollution claims under the international legal regime, although easily established, will not be fully compensated if the claims exceed the statutory liability limit of shipowners. This may be a price for strict liability provisions under the international regime.[278]

B. **Causation**

Not all damage is recoverable under the common law of tort. There must be some causal connection between the damage suffered and the alleged act or omission of the defendant. Mere factual causation is not enough; the plaintiff must also prove the legal causation by meeting the test of remoteness or foreseeability. Yet factual causation or causation in fact (*causa sine qua non*) is a prerequisite to legal causation or *causa causans*. If the damage would happen anyway, irrespective of the act or omission of the defendant, the action lacks causation in fact and, therefore, there would be no question of legal causation. Thus causation in fact "acts as a preliminary filter to eliminate the irrelevant."[279]

---

[276] See *British Transport Commission* v. *Gourley* [1956] AC 185 at 208 (H.L.). See also Fleming, *supra* note 242 at 259-260.

[277] However, loss of income without damage to personal property (pure economic loss) is not recoverable under common law. See *infra* 'Economic Loss' at 55.

[278] See *infra* the section on "Strict Liability" in Chapter Three at 74.

Causation in fact is determined by the so-called "but for" test.[280] Simply put, causation in fact is established once it is proved that the damage would not have happened but for the plaintiff's act or omission. This test would cover all types of claims following an oil spill. It would allow compensation for damage to a person or property, a fishermen's loss of income, loss of business in shops situated in fishermen's villages (as a result of reduced/lost income of the fishermen), loss of business in the fishing industry, loss of jobs for employees working in the fishing industry, loss of holiday value to holiday makers and loss of profit by hoteliers and tourist gift shops. *But for* the oil spill, these losses or damage would not have occurred in a particular oil spill case. The list can be very long. In order to put a limit on this long list of claims, courts have developed the test of foreseeability to prove legal causation. In other words, it must be proved that the damage suffered by the defendant is a foreseeable consequence of the defendant's act. For example, in the *Wagon Mound (No. 1)* case, the Privy Council did not allow the recovery of damages for the damage caused by fire following an oil spill because it was unforeseeable that fuel oil spread on water would cause a fire.[281] Another mechanism to restrict the category of damage is the requirement of a proprietary interest in the damaged property.[282]

---

[279] *Winfield, supra* note 176 at 199.

[280] See generally *ibid.* at 195-235.

[281] This is a case of negligence. Foreseeability of damage is also required in other torts. For example, in *The Wagon Mound (No. 2)*, [1967] 1 A.C. 617 (P.C), the Privy Council held that foreseeability has to be proved in cases of nuisance as well. See *ibid.* at 212.

[282] This will be discussed later under the headings of 'Economic loss' and 'Environmental Damage' at 55 and 60 respectively.

It is worthy of mention that when the defendant's act or omission is not the exclusive factor in causing the plaintiff's damage, the 'but for' test will lend no help in proving causation in fact. In such situations, courts use some other tests to arrive at just decisions.[283] The discussion on causation leads us to an examination of the different categories of damages sought and recoverable in tort actions.

III. Recoverable Damages

A. Physical Damage

Physical damage is generally recoverable as the plaintiffs can usually prove the test of legal causation in this kind of damage. This is a pre-eminent issue in most of the civil litigation cases. Physical damage can be of two types: damage to person and damage to property. The basis for the recovery of physical damage to the person is that when one's bodily security or personal integrity is harmed, it affects not only that person but also "undermines every one's sense of well-being, should the offence go unanswered."[284] Although the same does not hold true with regard to physical damage to property, concurrent occurrence of property damage and personal injury in most of the cases is considered as justification for treating them alike.[285]

---

[283] In *McGhee v. National Coal Board*, [1972] 3 All E.R. 1008 (H.L.), where many factors contributed to the plaintiff's disease (dermatitis), the House of Lords found that the defendant's failure to provide washing facilities "materially increased the risk" of the disease. This later became known as 'material increase in risk approach.' Later the Supreme Court of Canada in *Snell* v. *Farrell*, (1990) 72 D.L.R. (4th) 289, [1990] 2 S.C.R. 311, discussed the *McGhee* and held that in malpractice cases, very little evidence will suffice to draw an inference of causation in the absence of evidence to the contrary.

[284] Klar, *supra* note 183 at 173.

[285] *Ibid.* at footnote 7. See also B. Feldthusen, *Economic Negligence: The Recovery of Pure Economic Loss*, 4th ed., (Ontario: Carswell, 2000) at 13-5 [hereinafter Feldthusen], where he gave two other reasons, in addition to the above one, why property damage should be treated on the same footing as that of personal injury. They are: 1) Generally, the conduct which causes property damage poses also risk of causing personal injury and 2) Both in personal injury and property damage cases, society loses some resources.

In oil pollution cases, although the occurrence of personal injury is rare, it may be an issue if a person suffers skin or other bodily harm as a result of coming into contact with spilled oil on his or her land or property. Most of the physical damage in an oil pollution context would be damage to property. For example, a fisherman, whose fishing net is contaminated or whose fishing boat is damaged by spilled oil, can recover damages for the loss or damage.

Any loss consequential to physical damage is also recoverable. Consequential loss includes the lost use of property during the time of repair or replacement, or the lost opportunity to earn profit from chattels, like a fishing boat. In the *Southport Corporation* case, the contamination of the plaintiff's foreshore and lake by spilled oil was physical damage to its property. As Denning LJ. found negligence and nuisance in the discharge of the oil, he ordered the defendant to pay the cost of cleansing the foreshore.[286]

B. Economic Loss

Economic loss is of two kinds: consequential economic loss and pure economic loss.[287] The discussion here will be confined mainly to the latter kind. Consequential economic loss is loss which is causally consequent upon physical damage to a plaintiff's person or property.[288] So, it is also considered as part of physical damage. In contrast, the technical meaning of 'pure economic loss' in the law of torts is loss suffered by a

---

This is in contrast to pure economic loss, where society may not suffer a loss of resource, but merely a transfer of wealth as one firm's loss of business my generate gain in a competing firm.

[286] *Supra* note 190 at 458.

[287] Feldthusen, *supra* note 285 at 1.

[288] *Ibid.* This kind of economic loss is recoverable under the same principles governing recovery for physical damage.

plaintiff, independent of any loss or damage to its person or property.[289] For instance, fishermen, who could not fish following an oil pollution incident but suffered no damage with respect to their person or property, have undergone pure economic loss. Similarly, a seaside hotelier or restaurateur, whose business has been temporarily closed due to an oil spill on the beach and during the subsequent cleanup operations, also suffers economic loss.[290]

A plaintiff cannot generally recover pure economic loss under the common law for policy reasons. Cardozo C.J. eloquently articulated this point in the American case of *Ultramares Corp.* v. *Touche,*[291] where he stated that such losses present the potential for "liability in an indeterminate amount for an indeterminate time to an indeterminate class."[292] In other words, if pure economic loss is allowed, the "floodgates of claims" would open. The second stage of the *Anns* or *Kamloops (City)*[293] test contemplates these policy reasons. In order to prevent the so called 'floodgates' argument, courts try to draw a line between recoverable and irrecoverable damage with reference to actual damage to the person or property of a claimant. Where, however, the fear of indeterminate liability is absent, courts sometimes allow liability for non-physical damage (economic loss) under various exceptions to this exclusionary rule. Thus courts permit the recovery for pure economic loss resulting from negligent misrepresentation,[294] or, in limited circumstances, from defective products or buildings.[295] In oil pollution cases, the same fear of indeterminate liability is emphasized as a reason to deny the recovery of pure economic loss. However, fishermen, through an action based on public nuisance,[296] may recover economic loss following an oil spill if they can prove that they suffered special damage,[297] as no ownership or interest in land or property is necessary to prove public nuisance.[298]

---

[289] Most of the time, the word 'economic loss' is used as synonymous to 'pure economic loss'.

[290] According to Feldthusen, economic loss in negligence can follow from five situations: 1) negligent misrepresentation, 2) negligence performance of service, 3) defective products or building structures, 4) relational economic loss and 5) public authority's failure to confer an economic benefit. *Supra* note 276 at 2-3. Fishermen's loss of income or hotelier or restaurateur's loss of business following a negligent oil spill does not seem to fall under any of the situations. This may pose question about the validity of the classification. However, he put them under relational economic loss, although, strictly speaking, they are not relational economic loss as the losses are not the result of any damage to a third party's person or property. No one has proprietory intereset in seas or in natural resources. Alternatively, he prefers these losses to be considered as public nuisance. See Feldthusen, *supra* note 285 at 249-254.

[291] 174 N.E. 441(Court of Appeals of N.Y.1931).

[292] *Ibid.* at 444.

[293] *Supra* note 179 and 180.

A relational economic loss arises when a plaintiff suffers loss as a result of damage or loss to a third person's property.[299] For example, an employee of a yacht company may lose his or her job because of damage to the yachts caused by an oil pollution incident; or a fish processing company may suffer loss of business following property damage to fishermen who supply fish to the company. While the first example is one of contractual relational economic loss, the latter involves non-contractual relational economic loss. Damages for relational economic loss, in general, are also not recoverable. This is because as stated by Lord Oliver in *Murphy* v. *Brentwood District*

---

[294] See *Hedley Byrne & Co.* v. *Heller & Partners Ltd.*, [1963] 2 All E. R. 575 (H.L.); *The Pas* v. *Porky Packers Ltd.*, (1976), 65 D.L.R. (3d) 1 (S.C.C.).

[295] See *Rivtow Marine Ltd.* v. *Washington Iron Works*, (1973), 40 D.L.R. (3d) 530 (S.C.C.); *Winnipeg Condominium Corp. No. 36* v. *Bird Construction Co.*, (1995), 23 C.C.L.T. (2d) 1(S.C.C.). However, the English courts do not allow the recovery for this kind of economic loss. See *D. & F. Estates Ltd.* v. *Church Commrs. for England*, [1988] 2 All E. R. 992 (H.L.).

[296] The oil spill was held public nuisance by Denning LJ in *Southport Corporation* v. *Esso Petroleum Company Ltd.* [1954] 1 Lloyd's Rep. 446 at 456 (C.A.).

[297] Although fishermen's suffering can be distinguished from that of general public who use the affected area only for navigation, Canadian courts, however, consistently held that fishermen suffered no special damage as the right to fish in the seas is open to all public. The fishermen's injury is merely different in degree, not different in kind from that suffered by the general public. See *Hickey et al* v. *Electric Reduction Co. of Canada, Ltd.*, 21 D.L.R. (3d) 368 (Nfld Supreme Court 1970) .

[298] This may not so in Canadian common law. *Ibid.* American and English common law are less restrictive in this regard. See *supra* notes 232, 233 and 234.

[299] See generally, P. H. Osborne, *The Law of Torts*, (Toronto: Irwin Law, 2000) at 175-184[hereinafter Osborne].

Council,[300]

> "...a party cannot successfully sue in tort for the interference with his economic expectations or advantage resulting from injury to the person or property of another person with whom he has or is likely to have a contractual relationship."[301]

The scope of relational economic loss was in issue in a recent Scottish oil pollution case, *Landcatch Ltd.* v. *International Oil Pollution Fund.*[302] The facts of the case are as follows: on January 5, 1993 the ship *Braer* was grounded in the Shetland Islands, and over 80,000 tons of persistent oil escaped. Following the incident, the Scottish government created an exclusion zone and imposed a ban on fishing and other sea-related activities in the area. The appellants, owners of a salmon hatchery, used to sell 65% of their annual 2 million smolts (juvenile salmon of up to two years of age) to salmon farmers in the Shetland. The farmers then, in turn, would on-grow the smolts to maturity in seawater before they could be sold in the market. The exclusion zone included the farms of the appellants' customers (the farmers) and therefore the customers did not buy the smolts. The appellants sued the shipowners, their insurers and the IOPC Fund for, *inter alia*, smolts culled due to lack of sales. The court held that the claim was "relational economic loss which is too remote from the causal factor which makes the causer liable".[303] The loss was relational economic loss because their damage occurred due to some problem on their customers' farms. The court held that relational economic loss is recoverable neither in common law nor under the international statutory regime legislating oil pollution. On a different point, although the claim was based on the strict liability regime of statutory law for oil pollution damage, the Scottish court still applied the common law test of remoteness in determining damage.[304]

---

[300] [1991] 1 A.C.398 (H.L).

[301] *Ibid.* at 485. Similar pronouncement was made by Justice Holmes in *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U.S. 303, 1928 AMC 61 (1927) at 309 (Supreme Court of the United States), "A tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong."

[302] [1999] 2 Lloyd's Rep. 316 (Scotland Second Division Inner House Court of Session).

[303] Per Lord McCluskey at p. 335.

Although there are few circumstances where damages can be recovered for contractual relational economic loss, this is not true of non-contractual relational economic loss. In fact, the exceptional circumstances are so narrow that they can actually be considered as the branches of physical loss to personal property rather than the economic loss. The circumstances include:[305]

1) When plaintiff has a proprietary or possessory interest in the damaged property of the third party;[306]

2) In a ship accident, when the cargo owner contributes to the expenses (known as general average contribution) for the repair of the ship;[307]

3) In a joint venture, when the plaintiff uses property, owned by third person, for the purpose of the joint investment[308] and

4) Where technically the plaintiff is not yet owner but bears the risk of any damage to the property.[309]

In all of these situations, the plaintiff has either a proprietary interest or has contributed to the improvement of the property. These circumstances therefore, in a sense, relate to personal property claims. A plaintiff in an oil pollution case will also be able to recover damages in these situations.

---

[304] "...the test of remoteness is too well established to be excluded except by express and unambiguous enactment." Per Lord McCluskey at p. 335. The enactment referred here is the *Merchant Shipping Act* 1971 and 1974, which incorporated the Liability Convention 1969 and Fund Convention 1971 respectively.

[305] See generally Osborne, *supra* note 299 at 176-181.

[306] See *Valley Husky (Bermuda) Ltd.* v. *St John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, 153 D.L.R. (4th) 385 (S.C.C.).

[307] See *Re The Sucarseco* (1935), 294 U.S. 394, 55 S.Ct. 467 (US Supreme Court); *Morrison S. S .Co.* v. *Greystoke Castle (Cargo Owners)*, [1947] A.C. 265 [1946] 2 All E.R. 696 at 703 (H.L.).

[308] See *Canadian National Railway* v. *Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, 11 C.C.L.T. (2d) 1, 91 D.L.R. (4th) 289 (S.C.C.).

[309] See *St. Lawrence Construction Ltd.* v. *Federal Commerce & Navigation Co.*, [1985] 1 F.C. 767 (C.A.); *Triangle Steel & Supply Co.* v. *Korean United Lines Inc.*, (1985), 32 C.C.L.T. 105 (B.C.C.A.).

C. Environmental Damage

Environmental damage is the most serious damage caused by an oil pollution incident. Yet, it may come as a surprise to know that damages for environmental injury are not recoverable under the common law, as the value of the environment, although enormous, cannot be determined in monetary terms.[310] Unlike property, the environment does not have economic value to a particular plaintiff.[311] The environment here means wild animals on land, water, fish and other marine flora and fauna in the sea or the sea itself.[312] Normally two difficult questions arise with regard to damage to the environment and, for our purposes, the marine environment:

1) Who has the standing (*locus standi*) to bring an action for such damage?

2) How are damages to the environment assessed?

Since nobody has ownership of the environment[313] and thus no *locus standi* to bring a suit, common law jurisdictions tend not to allow any compensation for damage to the environment or natural resources.[314] The birds in the air, the fish in the sea are compared with wild animals and private ownership over them can be established only when they are caught and thus reduced into possession.[315] The law of torts gives no redress for dead birds, spoiled fish or damaged marine flora and fauna following an oil pollution incident.[316] If public land is damaged, government, like any landowner, can claim damages under the ordinary principles of common law.[317]

---

[310] M. Jacobsson and N. Trotz, "The Definition of Pollution Damage in the 1984 Protocols to the 1969 Civil Liability Convention and the 1971 Fund Convention", (1985) J. Mar. L. & Comm. 467 at 479 [hereinafter Jacobsson and Trotz].

[311] *Ibid.*

[312] See K.T.Grady, "*Commonwealth of Puerto Rico* v. *SS Zoe Colocotroni*: State Actions for Damage to Non-Commercial Living Natural Resources", (1980-1) 9 Boston College Environmental Affairs Law Review 397 at 401 [hereinafter Grady].

[313] Earlier American cases such as *Geer* v. *Connecticut*, 161 U.S. 519 (1896) (US Supreme Court) and *La Coste* v. *Department of Conservation*, 263 U.S. 545 (1924) (US Supreme Court), held state ownership in its wildlife and natural resources in its sovereign capacity. However, later cases such as *Toomer* v. *Witsell*, 334 U.S. 385 (1948) (US Supreme Court) and *Hughes* v. *Oklahoma*, 441 U.S. 322 (1979) (US Supreme Court) held otherwise. See *ibid.* at 406-8.

The American courts have solved the problem of ownership or *locus standi* on the basis of two doctrines: public trust and *parens patriae*.[318] In essence, both doctrines carry the same meaning. Under the first doctrine, a state holds environmental resources in trust for the benefit of the public and can seek compensation for any diminution of these resources, the trust corpus.[319] In *Illinois Central Railroad* v. *Illinois*,[320] the Supreme Court described the navigable waters of Lake Michigan as "a title held in trust for the people of the state that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties."[321]

The doctrine of *parens patriae* is generally invoked in the human context with regard to the state's duty to take care of those who are unable to take care of themselves.[322] The environment is compared to such a person. In America, states use the doctrine to seek compensation for damage to its "quasi-sovereign interests".[323] A State's interest in a clean environment is also considered as a quasi-sovereign interest.[324] When a ship spilled oil and caused damage to marine organisms, the doctrine was used to allow standing to the plaintiffs, i.e., the state authorities.[325]

---

[314] See Chao, *supra* note 104 at 340.
[315] Abecassis, *supra* note 207 at 135.
[316] *Ibid*. For the ownership of the fish in their wild state *Commonwealth* v. *Agway, Inc.*, 210 Pa Super Ct. 150, (1967 Superior Court of Pennsylvania) and *State* v. *Dickinson Cheese Co.*, 200 N.W. 2d 59 (N.D. 1972) (Supreme Court of North Dakota); cited in Grady *supra* note 312 at 409.
[317] See Grady, *supra* note 312 at 401.
[318] Chao, *supra* note 104 at 340-346. *Parens partiae* literally means "parent of his or her country." *Black's Law Dictionary*, 7th ed., (St. Paul, Minn.: West Group, 1999) at 1137.
[319] Grady, *supra* note 303 at 409; cases cited in support of the public trust doctrine are *Maryland* v. *Amerada Hess Corp.*, 350 F. Supp. 1060, 1066 (D. Md. 1972) (US District Court for the District of Maryland) and *State* v. *Jersey Central Power & Light*, 125 N.J. Super. Ct. 97, 308 A.2d 671 (1973) (Superior Court of New Jersey).
[320] 146 U.S. 387 (1892) (US Supreme Court).
[321] *Ibid* at 452.

The question of the assessment of environmental damage was dealt with in the *SS Zoe Colocotroni* case.[326] Damages for injury to personal or real property are based on the diminution in its market value or its replacement cost where the property is totally lost. Since there can be no market value for many environmental elements such as marine organisms or mangroves, the First Circuit Court of Appeal held that the assessment of damage to the environment should be based on the cost of actual restoration or rehabilitation of the environment to its pre-existing position, as far as possible, provided that the cost is not "grossly disproportionate".[327] The restoration approach is in line with the basic principle of compensation to the injured parties. Here the public who benefit from particular natural resources should be put, as nearly as possible, in the same position as they would have been in if there had been no tort.

There would be no restoration where it is not possible or practicable because its cost is grossly disproportionate to the harm involved. It is suggested that restoration costs would be grossly disproportionate when they are three or four times greater than the ecological value of the damaged resources.[328] Where restoration is not possible, an award of restoration cost for non-commercial environmental resources would put the state in a better position than it had been before the damage.[329] In such a situation, there are two probable alternatives. First, the assessment should be based on the ecological value of the resources. Such value may be determined by expert testimony based on various factors such as "contribution to fisheries, protection of erosion, land control, value of wetlands as nurseries, et. al., then economically assessing the loss in terms of recreation, fisheries, production of wood, and aesthetics."[330] Alternatively, the court can award the reasonable cost of acquiring comparable natural resources.[331] It is admitted that the assessment of environmental damage in these alternative ways poses dangers of uncertainty and inaccuracy in the amount of damages. However, using these methods to assess damages will bring, at least, as much certainty and accuracy as in the assessment of damages for "pain and suffering or mental anguish."[332]

---

[322] *Ibid.*
[323] Grady, *supra* note 312 at 412-5.
[324] *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230 (1907) (US Supreme Court).
[325] *Commonwealth of Puerto Rico* v. *The SS Zoe Colocotroni*, 456 F.Supp 1327 (D.P.R. 1978) (US District Court for the District of Puerto Rico), affirmed in par, vacated in part, remanded, 628 F. 2d 652 (1st Cir.1980), cert. denied 450 U.S. 912 (1981); the doctrine was applied in the district court decision at 1337.
[326] *Ibid.*
[327] *Ibid.* at 675.

IV. Conclusion

Common law does not provide much hope for oil pollution victims as it only allows recovery for physical damage while most oil pollution causes predominantly economic loss or environmental damage. Even in physical damage cases where a plaintiff has many alternative causes of action, it needs to cross many hurdles, such as proving the various elements of a tort, the test of foreseeability or remoteness and establishing that the damage occurred to its person or property. A plaintiff who overcomes these hurdles still has no guarantee that compensation for oil pollution damage will be awarded because the shipowner is privy to a host of defenses, which may neutralise the effect of any cause of action.

---

[328] *Ibid.*

[329] Grady, *supra* note 312 at 426.

[330] *Ibid.* quoted from Defendant's Post Trial Brief at 21, *Commonwealth of Puerto Rico* v. *The SS Zoe Colocotroni*, 456 F.Supp 1327 (D.P.R. 1978) (US District Court for the District of Puerto Rico).

[331] *Ibid.* at 427.

[332] *SS Zoe Colocotroni*, 628 F. 2d 652 at 675 (1st Cir. 1980).

For an oil pollution victim, the only possible advantage of common law over the present statutory regime is that once a tort is proved under the common law, the plaintiff will recover full compensation under the principle of *restitutio in integrum*. This is laudable because the recovery of damages under the statutory regime of international law is limited to the shipowners' maximum financial liability as provided under the international conventions.

For economic loss or environmental damage, the common law provides no remedy to oil pollution victims despite the obvious fact that the majority of oil pollution claims relate to these kinds of loss or damage. A caveat to the above statement would be the American common law, which allows the government to recover for environmental damage under the trust principle or *parens patriae*.

CHAPTER THREE

INTERNATIONAL OIL POLLUTION LIABILITY REGIME

The international oil pollution liability regime is a special liability regime, which was mainly introduced to eradicate the problem of inadequacy of the liability amount under general maritime law. Besides increasing the liability amount, the special regime made oil pollution a strict liability offence; introduced compulsory insurance; provided for direct claims against the insurer and also created the International Oil Pollution Fund (IOPC Fund). However, there is still need for reform in many aspects of the international oil pollution liability law, such as the adequacy of the liability amount, the amendment procedure to increase the limit of liability, the almost undeniable right of a shipowner to limit its liability, the exclusion of other possible responsible parties from liability and the scope of environmental damage.

The purpose of this chapter is to discuss the various aspects of the present international law. Part I of the chapter enumerates the recoverable damages under the international law. Parts II and III examine the positive and negative aspects of the present liability regime. Lastly, the chapter will highlight some important issues of the 2003 Protocol to the present liability regime, which was adopted at the IMO Conference in May 2003.

I. Recoverable Damages

Under the international regime, the only kind of damage recoverable is, to say it in one phrase, 'pollution damage'.[333] Pollution damage is defined in Article I (6) of the Liability Convention to mean,

---

[333] See Liability Convention, Article III (1).

> "(a) loss or damage caused outside the ship by contamination resulting from the escape or discharge of oil from the ship, wherever such escape or discharge may occur, provided that compensation for impairment of the environment other than loss of profit from such impairment shall be limited to costs of reasonable measures of reinstatement actually undertaken or to be undertaken;
>
> (b) the costs of preventive measures and further loss or damage caused by preventive measures."

It is noteworthy here that the courts of each Contracting State have jurisdiction both against the shipowners and the IOPC Fund.[334] Any person suffering pollution damage can bring an action against the shipowners in the courts of a Contracting State where pollution damage occurred.[335] Reasonable notice of any such action must be given to the shipowners.[336] If the same State is also a party to the Fund Convention, its courts have exclusive jurisdiction over any action against the Fund for pollution damage arising from the same incident.[337] If the State is not party to the Fund Convention, the claimants can bring an action against the Fund either before a court of the State where the Fund has its headquarters (the UK) or before a court of any Contracting State to the Fund Convention.[338] The Director the Fund is its legal representative.[339]

A. Physical Damage

The basic rule for recoverable damages under the international regime is that damage caused by the *contamination* of oil is recoverable. Physical damage normally occurs by contamination[340] and so, it is recoverable. As mentioned above, pollution damage is defined to mean "(a) loss or damage caused outside the ship by *contamination* resulting from the escape or discharge of oil from the ship..."[341] This is further elaborated in the *Claim Manual*[342] under the general criteria that govern all admissible claims. Two of the criteria are expressly related to contamination. They are:

---

[334] Article IX (2) of the Liability Convention and Article 7 (2) of the Fund Convention

[335] Article IX (1) of the Liability Convention.

[336] *Ibid.*

[337] Article 7 (3) of the Fund Convention.

[338] *Ibid.*

[339] Article 28 (2) of the Fund Convention.

- 'A claimant's expense/ loss or damage is admissible only if and to the extent that it can be considered as caused by contamination.
- There must be a link of causation between the expense/loss or damage covered by the claim and the contamination caused by the spill.'

So, claims for cleaning, repairing or replacing the property which has been contaminated by oil are admissible. Such damage occurs to beaches, boats, yachts, fishing nets or gears and wharfs. Physical damage without contamination is not recoverable. For example, fire damage following an oil spill is not recoverable as it is not a damage caused directly by contamination, but by fire.[343] Contamination must be the immediate cause; it is not enough for contamination to be the initial cause.[344] It is noteworthy that physical damage also includes personal injury or death. Yet such damage is rare in an oil pollution case. Persons on board the ship, causing the pollution damage, may suffer this kind of damage but they cannot recover for their injury or loss under the liability regime as the definition of pollution damage only covers damage caused 'outside the ship',[345] not onboard the ship. Such persons are normally the employees of a shipowner. However, they can recover their damages under their contract of employment or some insurance policies.[346]

---

[340] For example, in *Southport Corporation* case the plaintiffs' private beaches were polluted by contamination.

[341] Emphasis added.

[342] *Claims Manual, supra* note 170 at 16-17. It is noteworthy here that it is not a legally binding document as it is not part of the Conventions. It is simply meant to be a guide for the claimants and the IOPC Fund. The guideline is based on the Liability Convention and Fund Convention and the decisions of the IOPC Fund's Assembly.

[343] See D. W. Abecassis and R. L. Jarashow, *Oil Pollution from Ships*, 2d ed. (London: Stevens & Sons, 1985) at 208 [hereinafter Abecassis and Jarashow].

[344] Ignition of fire following contamination may be argued also to have broken the chain of causation.

Some specific examples of recoverable physical damage

- Fishermen's property damage,
- polluted beaches or yachts,
- damage to harbors and wharves, and
- damage to cleaning equipment, roads etc.

B. Economic Loss

Economic loss is the consequential loss that may follow oil pollution. Economic loss can be of two different kinds: general economic loss resulting from damage to a person or property and pure economic loss, which is loss that occurs without any physical injury or without any damage to proprietary interest. However, the international liability regime does not make any distinction between these two kinds of economic loss. Here again contamination is the most important factor in determining economic loss, because the only admissible economic loss under the international liability regime is the one following physical damage by contamination, regardless of any proprietary interest in the damaged materials.

---

[345] Article I (6) (a) of the Liability Convention.

[346] Damages to passengers on a ship are governed by the Convention on Limitation of Liability for Maritime Claims, 1976; 16 I.L.M 606 (1977).

Although the definition of pollution damage, the only recoverable damage,[347] does not expressly mention economic loss, the *Claim Manual* shows that such claims are acceptable. An example of a claim of this nature would be a fisherman's loss of income as a result of his nets becoming contaminated by the spilled oil. The fisherman's damage here is also recoverable under the common law. Yet, unlike the common law, a fisherman suffering no damage to his or her net or boat or anything can also recover for the loss of income due to polluted sea from the spilled oil. The criterion is contamination. If the sea is contaminated by oil, fishermen will recover damages for not being able to catch fish, even though they have no proprietary right either in the sea or the fish in it. 'Claims for pure economic loss are admissible only if they are loss or damage caused by contamination.'[348]

The criterion of contamination, without any link to proprietary interest, is much wider than common law, and covers all the claims by all the persons who are affected by an oil spill in one way or another. This may open the floodgates of claims. To prevent the floodgates, the IOPC Fund developed some other sub-criteria for economic loss. They are:[349]

1. 'the geographic proximity between the claimant's activity and the contamination
2. the degree to which a claimant was economically dependent on an affected resource
3. the extent to which a claimant had alternative sources of supply or business opportunities

---

[347] See Article III (1) of the Liability Convention.
[348] *Claims Manual*, *supra* note 170t 23.
[349] *Ibid.*

4. the extent to which a claimant's business formed an integral part of the economic activity within the area affected by the spill

5. the extent to which a claimant was able to mitigate his loss.'

Some specific examples of recoverable economic loss

a. fishermen's loss of income

b. hoteliers' loss of business

c. tourist shops' loss of customers

d. fish processing plants' loss of business

e. loss of income by employees of the tourist industry and fish processing plants

C. Environmental Damage

Recovery for environmental damage is the most debated area in the oil pollution liability regime. There are both practical as well as theoretical problems with regard to such damage. The theoretical problem lies in the question of who owns the environment.[350] The environment used to be viewed as common property and owned by 'nobody'.[351] Under the traditional approach, it seems that recovery of such damage was not the business of any individual. Practical problems also arise when it comes to the measurement of environmental damage. We all know and agree that the ocean and the clean water in it have tremendous value to us but it is difficult to put such value into monetary units.

---

[350] Another way to put the question is who has the *locus standi* to bring an action for environmental damage.

[351] The fish in the sea, the birds on the sky belong to no body unless they are caught and thus reduced to ownership. See *R v Mallison* (1902) 86 LT 600 and *The Case of Swans* (1592) 7 Co Rep 15b; cited in Abecassis, *supra* note 207at 135.

The growing awareness and concern to protect the environment have produced some solutions to these theoretical and practical problems. With regard to the question of ownership, various articles of the United Nations Convention on the Law of the Sea [UNCLOS][352] recognize the sovereignty and jurisdiction of a State over the resources of its territorial sea and exclusive economic zone.[353] Among the national legal systems, the American courts solved the problem of ownership or *locus standi* on the basis of two doctrines: that of *parens patriae* and the public trust.[354] In essence, both doctrines carry the same meaning. The doctrine of *parens patriae* is applied in the human context with regard to the state's duty to take care of those who are unable to take care of themselves.[355] The environment is thus compared to such a person. Alternatively, the state is also considered a trustee over the natural resources and must ensure the quality of these resources.[356]

With regard to the question of assessment, the USA has also the leading position. In the well-known case of the *SS Zoe Colocotroni*,[357] the Court of Appeal (First Circuit) held that the assessment of damage to the environment should be based on the cost of restoration or rehabilitation of the environment to its pre-existing position, as far as possible, provided the cost is not grossly unrealistic. When this case was decided in 1981, the international regime made no provision even for restoration costs.[358] Since then, the 1992 Protocols to the international oil pollution liability law have introduced compensation provisions for the impairment of the environment, limited to the actual cost of restoration.[359] On the other hand, the OPA'90 went further than just providing restoration costs; environmental damage also includes the loss of the use value of the environment or diminution in the value of the environment itself, even when no restoration is carried out because either it is not feasible or is disproportionately costly.

---

[352] Dec. 10, 1982, 1833 U.N.T.S. 3; *UN Convention on the Law of the Sea*. (New York, 1997) (UN Publication, Sales No. E.97.V.10).
[353] See Articles 220, 221, 226, 229 and 235.
[354] Chao, *supra* note 104 340-346.
[355] *Ibid.*
[356] *Ibid.* at 342.
[357] *Commonwealth of Puerto Rico* v. *The SS Zoe Colocotroni*, 628 F. 2d 652, 1981 AMC2185 (1st Cir 1980, cert. denied 450 U.S. 912 (1981).
[358] See the definition of 'pollution damage' in the 1969 Liability Convention.

In order to put a value on the affected natural resources in addition to the cost of restoration, some hypothetical valuation methods have been developed in some countries. The most notable among them is the one called contingent valuation method [hereinafter CVM].[360] This method is used for the measurement of non-use value of the environment. The lost use of natural resources can be of two types: real use value to the actual user and non-use value to those who never visited and have no plan in the near future to visit the impaired resource, but get satisfaction from the fact that such resources do exist. The damages for the first kind of lost use can be measured through market-based methods, such as fees paid for the use of natural resources for activities like hiking, swimming and camping.[361] Under the CVM, the non-use value of natural resources is assessed on the results of survey based on the hypothetical question of how much the survey participants would pay to preserve the resource in question.[362] The responses are then extrapolated to arrive at the value of the affected natural resources.[363] Another method was in use in the Soviet Union called "Methodica",[364] under which the damage is assessed on the assumption that each tonne of spilled oil pollutes a given quantity of sea water at a given per cubic meter cost.[365] However, the international oil pollution liability law categorically excludes any kind of theoretical valuation methods.[366]

---

[359] M. Holt and G.R. Cecil, "Natural Resources Damages for Oil Spills: The International Context" (1995) 9 Natural Resources & Environment 28 (4) at 29 [hereinafter Holt].

[360] See generally M. Montesinos, "It May Be Silly, But It's An Answer: The Need To Accept Contingent Valuation Methodology In Natural Resources Damage Assessments" (1999) 26 Ecology Law Quarterly 48 [hereinafter Montesinos].

[361] *Ibid* at 50.

[362] See *ibid.* at 51-52.

[363] *Ibid.*

[364] Holt, *supra* note 359 at 29.

Under the Liability Convention, the pollution damage includes "costs of reasonable measures of reinstatement actually undertaken or to be undertaken".[367] This is a compromise solution between the common law, where such damages are not generally recoverable, and the various hypothetical or speculative valuations. The cost of reinstatement or restoration measures for environment is further qualified by the following conditions:[368]

1. The cost of the measures should be reasonable.
2. The cost of the measures should not be disproportionate to the results achieved or the results which could reasonably be expected.
3. The measures should be appropriate and offer a reasonable prospect of success.

Some specific examples of recoverable environmental damage

a. clean up costs of sea water and beaches

b. costs to restore fish and other marine live stocks.

Although the international regime has come a long way from its original position in providing for environmental damage, it still has not reached the level of protection provided by the American courts.

D Cost of preventive measures

---

[365] Jacobson and Trotz, *supra* note 310 at 481. In the *Antonio Gram sci* case, the Soviet Union's claim for environmental damage was calculated by the by the court under a Soviet legislation by (a)establishing quantity of oil spilled, (b)then assuming it spread on the water 50 parts per million, (c)estimating the quantity of water affected by dividing (a)by (b) and (d) lastly by multiplying (c) by an amount per cubic metre read from tables giving expenses per cubic metre for restoration. This account is taken from Abecassis and Jarashow, *supra* note 343 at 209.

[366] *Claims Manual, supra* note 170 at 28.

[367] Liability Convention, Article I (6) (a).

[368] *Claims Manual, supra* note 170 at 28.

The costs of preventive measures are recoverable.[369] Such cost can incur before or after an oil spill. Preventive measures may be so successful that the actual spill never occurs. This type of liability was not covered before and it is highly controversial in common law, but costs for such measures are now recoverable under the Liability Convention.[370] Such measures can be taken and the costs can be claimed by any person, whether a private individual, government authority or even the polluting ship itself.[371] To be admissible, the main purpose of the measures must be to prevent pollution. So, if a measure has dual purposes, such as salvage and the prevention of pollution, the primary purpose is the determining factor for recovery of damages. If it is not possible to determine the primary purpose with certainty, the costs of preventive measures are apportioned between the pollution prevention purpose and the other purpose.[372]

II. Positive Aspects of International Liability Regime

A. Strict Liability

The imposition of strict liability is a big step forward in ensuring that the victims of oil pollution get prompt compensation without requiring lengthy legal process to discover whether there was fault on the part of the shipowner. Chapter Two showed how difficult it is to prove a tort liability under common law. Strict liability involves the presumptive imposition of fault on the part of shipowners, unless they can prove any of the few exonerating factors. The exonerating factors are mainly factors which cause oil pollution beyond any control of shipowners or their servants.[373] The exonerating factors can be divided into two categories, full exoneration and partial exoneration.

---

[369] Liability Convention, Article I (6)(b) i.e., the second part of the 'pollution damage'.

[370] Because Article I (8) of the Liability Convention 1969 defined an incident to mean only an actual occurrence, whereas the Liability Convention 1992, Article I(8) included 'a grave threat of causing pollution damage' in the definition of an incident.

[371] Liability Convention, Article V (8).

[372] *Claims Manual, supra* note 170 at 24-25.

1. Full Exoneration

Full exoneration is given in the following circumstances:

a. incidents caused by an act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character,[374] or

b. incidents caused wholly by an act or omission done with intent to cause damage by a third party,[375] or

c. incidents caused wholly by the negligence or wrongful act of any Government or other authority responsible for the maintenance of lights or other navigational aids in the exercise of that function,[376] or

d. incidents caused wholly by the victim or claimant.[377]

2. Partial Exoneration

Partial exoneration of liability on shipowners is expressly provided only in the case of partial or contributory negligence of a claimant.[378] The Shipowners' exoneration will be proportionate to the fault of the victims/claimants. For example, if an incident is caused by 50% contributory negligence of a shipowner and 50% of a claimant, the shipowner has to pay only 50% of the damages.

The Liability Convention is not clear on the relationship between the shipowner's contributory negligence and the factors leading to full exoneration set out in paragraph

---

[373] Liability Convention, Article III (4).
[374] *Ibid.* Article III (2)(a).
[375] *Ibid.* Article III (2)(b).
[376] *Ibid.* Article III (2)(c).
[377] *Ibid.* Article III (3).
[378] *Ibid.*

(a) above. They are act of war, hostilities, civil war, insurrection or a natural phenomenon of an exceptional, inevitable and irresistible character. Since the word 'wholly' is not mentioned in causative factors of paragraph (a), unlike the situations in paragraphs (b) and (c), it can be argued that shipowners' liability will be proportionate to their contributory negligence or fault and they will not be fully deprived of the defenses in paragraph (a) when the incidents are partly caused by those factors and partly by the shipowner's fault.[379] Wu Chao argued[380] that any factor in (a) would give the shipowner full exoneration, even when its negligence or fault contributed to or aggravated the oil pollution damage. Her argument is that since the word 'wholly' was deliberately omitted form the paragraph (a), as was later confirmed by 1984 Conference,[381] full exoneration is available by the mere presence of the any of the factors in paragraph (a). Yet common sense dictates that the extent of exoneration should depend on the extent to which the factors in (a) caused the pollution. The defenses in paragraphs (b) and (c) are only available when the factors in (b) and (c) are the exclusive cause of the incident.

The full or partial exoneration of shipowners from liability does not necessarily mean that the victims are without any redress. The victims can claim their un-redressed damages from the IOPC Fund. However, if a claimant is guilty of causing the incident or the incident resulted from an act of war, hostilities, civil war or insurrection, neither the Fund nor the shipowner is responsible.[382] In other situations in which the shipowner is exonerated, the IOPC Fund under the Fund Convention will compensate the victims or claimants. So, in cases of natural phenomena, the fault of a third party[383] and that of government authority through a failure to maintain navigational lights and aids, the Fund will be the source of compensation, instead of shipowner. However, in the latter two situations, the Fund has right of recourse against the third party or the negligent government authority.[384]

---

[379] Chao, *supra* note 104 at 60.
[380] *Ibid.* at 61.
[381] *Official Records* 1984, Vol. 2, LEG/CONF. 6/ C.2/SR.10, at 8. cited in Chao, *supra* note 104 at 61.
[382] See article 4(2) of the Fund Convention.

B. Compulsory Insurance

The concept of compulsory insurance was quite revolutionary in maritime law at the time of the creation of the Liability Convention and the Fund Convention, although it was present in other liability law.[385] Its emergence is also in line with the Conventions' objectives 'to ensure that adequate compensation is available to persons who suffer damage'.[386] This is the key element for the continuous success of the liability regime as a high level of liability without corresponding compulsory insurance may prove useless because of the corporate veil or the insolvency of a shipowner. Article VII (1) of the Liability Convention provides,

> "The owner of a ship registered in a Contracting State and carrying more than 2000 tons of oil in bulk as cargo shall be required to maintain insurance or other financial security, such as the guarantee of a bank or a certificate delivered by an international compensation fund, in the sums fixed by applying the limits of liability prescribed in Article V, paragraph 1[387] to cover his liability for pollution damage under this Convention."

---

[383] For example, another ship.

[384] Fund Convention, Article 9 (2).

[385] For example, the International Convention for the Unification of Certain Rules relating to Damage caused by Aircraft to Third Parties on the Surface 1933 (the Rome Convention).

[386] See the preamble to the Liability Convention and Fund Convention.

[387] Article V, paragraph 1 provides, "The owner of a ship shall be entitled to limit his liability under this Convention in respect of any one incident to an aggregate amount calculated as follows:
(a) 3million units of account for a ship not exceeding 5,000 units of tonnage;
(b) for a ship with a tonnage in excess thereof, for each additional unit of tonnage, 420 units of account in

Although no insurance is necessary for ships carrying 2,000 tons or less of oil, the claimants or victims have another source of redress for pollution from such ships as the IOPC Fund is under a duty to pay compensation to persons suffering pollution damage if the shipowner is financially incapable of meeting its obligation.[388] Compulsory insurance cannot be directly imposed on ships of a non-Contracting State as the provisions of the Conventions cannot bind such States. However, if ships from a non-contracting state want to enter a port of a Contracting State, they must have insurance to meet their liability. The Liability Convention requires a Contracting State to ensure that 'insurance or other security is in force in respect of any ship, *wherever registered*, entering or leaving a port in its territory, or arriving at or leaving an off-shore terminal in its territorial sea, if the ship actually carries more than 2,000 tons of oil in bulk as cargo'.[389]

It appears that when ships of a non-Contracting state pass through the exclusive economic zone (EEZ) of a Contracting State, they do not have to show any financial guarantee, although pollution damage by a ship in the EEZ is recoverable under both the Liability Convention[390] and the Fund Convention.[391] This may be an unintended situation due to an oversight during the preparation of the 1992 Protocols when the applicability of international regime was extended to the EEZ or it may be explained by the practical problems in supervising ships in EEZ.

C. Direct action against the insurer

---

addition to the amount mentioned in sub-paragraph (a); provided, however, that this aggregate amount shall not in any event exceed 59.7 million units of account.

[388] Fund Convention, Article 4(1)(b).

[389] Liability Convention, Article VI (11) (emphasis added).

[390] *Ibid.* Article II (a) (ii).

[391] Fund Convention, Article 3 (a) (ii).

The object of ensuring adequate compensation to pollution victims is further buttressed by the provision of a direct action against the insurer. This is a radical departure from the traditional insurance policy under which a third party cannot bring an action against the insurer as there is no privity of contract between the insurer and the victim.[392] Insurance is a contract between the insurer and the insured and the insurer is normally bound to the insured. In addition, the shipowners' insurance is mainly indemnity insurance from the P&I Clubs. Indemnity insurance is based on 'pay to be paid' policy.[393] However, article VII (8) of the Liability Convention provides,

> "Any claim for compensation for pollution damage may be brought *directly* against the insurer or the person providing financial security for the owner's liability for pollution damage."[394]

If a shipowner loses its right to limit its liability, the insurer will not be liable for more than the insured amount i.e., the limited amount. The available defenses to the insurer are the same as those available to the insured shipowner. In addition, the insurer may also exonerate itself from liability if the oil pollution is caused by the willful misconduct of insured shipowner. Willful misconduct appears to be different from a personal act or omission committed with the intent to cause damage. A personal act or omission by a shipowner with the intention to cause oil pollution damage is not a defense for the insurer, whereas willful misconduct is a defense. Such an act or omission results in depriving a shipowner of its right to limited liability.[395] In this respect, willful misconduct seems to be a more serious offence than a personal act or omission causing intentionally oil pollution damage. Yet, for the purpose of unlimited liability, willful misconduct seems to be a lesser fault than a personal act or omission, as the latter causes the deprivation of right to limit not the former. In practice and in their ordinary meaning they may be one and the same thing.

---

[392] See Gauci, *supra* note 30 at 221.
[393] *Ibid.* at 221-224.
[394] Emphasis added.
[395] Liability Convention, Article V(2).

D. IOPC Fund

The Fund works, in one sense, as a safety net to enable the victim to recover damages where a shipowner or its insurer is not liable under the Liability Convention[396] because of an exonerating factor or is financially unable to pay the victims of oil pollution.[397] It also works as a source of supplementary compensation in case damages exceed the shipowner's limit of liability.[398]

The Fund has very limited defenses, even less than those available for the shipowners under the Liability Convention. The Convention provides:

a. A full defense in case of an act of war, hostilities, civil war or insurrection, or discharge from a warship and government ship used on non-commercial services,[399]

b. A full defense also in case of 'mysterious spill' i.e., spill the source of which is unknown,[400]

c. A full or partial defense in case of fault of the victim, depending on the degree of such contributory fault or negligence on the part of the victim.[401]

---

[396] Fund Convention, Article 4 (1)(a).

[397] Such a situation may arise if in an unlikely event both the shipowner and his insurer become bankrupt or the shipowner is bankrupt and the insurer proves wilful misconduct on the part of the shipowner. This situation is envisaged in the Fund Convention, Article 4 (1) (b).

[398] Fund Convention, Article 4(1) (c).

[399] *Ibid.* Article 4 (2) (a).

[400] *Ibid.* Article 4 (2) (b).

The Fund pays for the damage caused by a natural phenomenon, even though a shipowner is exonerated from liability in such situation.[402] There are two other situations when a shipowner is exonerated, but not the Fund. They are:

a. An incident caused by a third party,

b. An incident caused by the negligence of the government authority in charge of maintaining lights and navigational aids.

However, in these latter two situations, the Fund may use its right of recourse against the party causing the incident, though the third party may not have the money to satisfy a judgment.

III. Negative aspects of the international regime

A. Limited and inadequate amount

It is undeniable that the present international system has proved adequate in dealing with most of the oil pollution incidents in the last two decades. However, a few incidents created damages which exceeded the system's maximum compensation amount. Some 10 out of 100 incidents dealt by the IOPC Funds raised the question of the inadequacy of the existing limit.[403] The incidents of *Prestige* in Spain,[404] *Erika* in France and *Nakhodka* in Japan are among most recent examples. The number is small, given the total number of oil spills, many of which do not even involve the IOPC Fund as claims arising from these incidents do not exceed the shipowners' limit of liability.[405] Yet it is still quite unacceptable in terms of principle and logic that victims of major oil pollution incidents should get less compensation than the victims of small oil spills for similar damage.

---

[401] *Ibid.* Article 4 (3).

[402] This situation is expressly mentioned in the Liability Convention as an exonerating factor for shipowner's liability. The non-existence of this provision in the Fund Convention is deliberate as Article 4 (4) (b) specifically mentions the Fund's payment of damages in such situation.

[403] COM (2000) 802 final at 55.

[404] On November 13, 2002, it broke in two off the coast of Galicia (Spain) spilling an unknown but substantial quantity of its cargo. It was carrying 77000 tonnes of heavy fuel oil. The IOPC Fund estimates

The principle of damage in tortious litigation is *restitutio in integrum* i.e., its objective is to restore the victim to the position they occupied before the tort was committed, as far as money can do so. The principle is explained:

> Where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at the sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.[406]

Due to the shipowners' right to limit their liability, the application of this principle is not possible in maritime law, in particular, when a major incident occurs. Therefore, the victims of major oil spills face the double jeopardy of both first being the victims of catastrophic incidents and then of being denied full compensation through no fault of their own. Victims of disastrous incidents, who suffer more damage than the international system allows them to recover, are left without full compensation. The limitation of liability might have been acceptable if the international system was unable to bear the cost of such big oil pollution damage. In fact, the shipowners' Protection and Indemnity (P&I) Clubs alone give their members an insurance guarantee of US$ 1

---

that the total amount of the claims arising from the incident will significantly exceed the amount available for compensation. Online: the IOPC Fund Homepage <http://www.iopcfund.org/prestige.htm> (last modified: 16 May 2003).

[405] *Ibid.*

[406] *Livingstone* v. *Rawyards Coal Co* (1880) 5 App. Cas. 25 at 39, per Lord Blackburn (H.L.).

billion,[407] whereas under the present liability system the maximum liability of any ship including the biggest ship of the world is SDR 59.7 million.[408] The owners of the cargo, mainly the oil companies, bear the extra liability up to a maximum of SDR 135 million, combined with the above liability limit of shipowners. As discussed earlier, by virtue of the IMO Legal Committee's resolution on October 18, 2000, the maximum combined liability under the international regime would be SDR 203 million from November 2003.[409] Even this increased amount would be insufficient to meet the damages caused by incidents like *Erika* or *Nakhodka*.[410]

In addition to the inadequacy of the liability amount, the system creates long delay in the payment of compensation. Any time there is a possibility that the total number of claims would exceed the maximum amount of the IOPC Fund's liability ceiling, even proven claims are paid only partially, on a pro-rata basis, until all the claims are fully established.[411] Sometimes it may take years for all the claims to be proved, particularly when disputes occur between the Fund and the claimants as to the admissibility of claims and consequently the claims have to be determined by the courts. For example, the *Braer* incident occurred on January 5, 1993, in Shetland Islands of the United Kingdom and the claims are not still fully settled.[412] As a result, other claimants whose claims were established and recognized by the Fund have to wait for the outcome of the decisions regarding the disputed claims in order to get their final compensation. This result occurs because the outcome of litigation might affect individual shares of damages if the total claims exceed the maximum amount of liability under the international regime. However, in the end it may be that the total amount payable for all the established claims would not exceed the maximum liability of the Fund, but the claims are delayed for years because of uncertainty about the ultimate decisions of the courts. The root cause of the problem is the inadequacy of the liability amount, which undermines the stated objective of the international regime, as set out in the preambles to the two Conventions, to provide adequate compensation to victims of pollution.

---

[407] See 92FUND/A.6/4; 92FUND/WGR.3/9/7.1.9. p 13.
[408] The Liability Convention, Art. V (1).
[409] *Texts of the 1992 Conventions, supra* note 126 at 52.
[410] *SOPF: Annual Report 2000, supra* note 6 at iii.
[411] *Claims Manual, supra* note 170 at 18.
[412] *Annual Report 2001: IOPC Funds, supra* note 9 at 53.

On the other hand, in common law a defendant's liability is assessed on the basis of damage suffered by the plaintiff victim. The financial ability of the defendant or its insurer is not a factor in the assessment of the liability amount. For example, in *Lim* v. *Camden Health Authority*,[413] Lord Scarman stated,[414]

> "...the principle of law is that compensation should as nearly as possible put the party who has suffered in the same place as he would have been in if he had not sustained the wrong. There is no room here for considering the consequences of a high award upon the wrongdoer or those who finance him."

The shipowner's maximum liability is not based on the damage suffered by the plaintiff but on the tonnage of the polluting ship. So, if damages exceed the amount calculated on this basis, the victims will be deprived of full compensation. The amount then will be distributed among the claimants in proportion to the amounts of their established claims.[415] The amount of maximum liability is calculated in the following ways,

(a) 3 million units of account (SDR)[416] for a ship not exceeding 5,000 units of tonnage;[417]

---

[413] [1980] A.C. 174 (H.L.).
[414] *Ibid.* at 187.
[415] Liability Convention, Article V (4).
[416] Liability Convention, Article V(9) (a).

(b) or a ship with a tonnage in excess thereof, for each additional unit of tonnage, 420 units of account in addition to the amount mentioned in sub-paragraph (a)[418] with the maximum aggregate amount not exceeding 59.7 million units of account.[419]

So, a shipowner's maximum liability can be SDR59.7 million. However, the total available fund to the victims of oil pollution can be SDR 135 million[420] because of the additional fund available under the Fund Convention from the IOPC Fund, which is contributed by the cargo interests i.e., the oil companies who receive more than 150,000 tons of 'crude oil' and 'fuel oil' as defined in the Fund Conventions.[421] If the total amount of oil received by contributors to the Fund becomes 600 million tons or more in any year, the maximum amount of Fund's payment will be 200 million SDR in the next year.[422] This amount appears very little when we consider the costs of damage following a catastrophic oil pollution incident like the *Exxon Valdez*.[423] The Exxon Shipping Corp. spent US$2.1 billion for clean up costs alone. It paid the US government another $1.25 billion as settlement of government claims and criminal liability compensation. Claims by the private individuals are still being litigated and have not been resolved yet. This is so despite the fact that the *Exxon Valdez* disaster ranks currently 53rd on the all-time list of major oil spills in terms of volume.[424]

---

[417] Liability Convention, Article V (1) (a). Article V (10) provides, " For the purpose of this Article the ship's tonnage shall be the gross tonnage calculated in accordance with the tonnage measurement regulations contained in Annex I of the International Convention on Tonnage Measurement of Ships, 1969." 1 ton = 100 cubic feet.

[418] *Ibid.* Article V(1)(b).

[419] *Ibid.* proviso to Article V(1)(b).

[420] Fund Convention, Article 4(4) (a).

[421] See *Ibid.* Article 10 and Article 1(3)(a) and (b).

[422] *Ibid.* Article 4(4)(c).

[423] On March 23, 1989, the tanker *Exxon Valdez* grounded at Bligh Reef and discharged 10.8 million gallons of crude oil into Prince William Sound. The details of the incident can be found online: *Exxon Valdez* Oil Spill Trustee Council Homepage <http://www.oilspill.state.ak.us/facts/details.html.> (date accessed: 23 June 2002).

It may be argued that the limitation of liability in the case of oil pollution is justified because strict liability is imposed on the shipowners. The argument is rebutted by the opponents of the system, who note that the dangerous nature of oil pollution itself is enough justification for stricter liability.[425] Indeed, the dangerous nature of oil pollution justifies the imposition of strict liability. However, when a shipowner's negligence or willful misconduct causes oil pollution incident, the liability on the shipowner must be unlimited. To overcome the problem of insurance coverage for unlimited liability, shipowners can buy insurance over and above that provided by their P&I Clubs, if any such insurance is available in the market. If no such insurance is available in the market or if the liability ever crosses even the additional insurance, the damages should be paid from the personal assets of the liable shipowner.

B. Amendment Procedures for increasing the limit

In 1992, 'tacit acceptance procedures' were incorporated both into the Fund Convention and the Liability Convention with the hope of fast and prompt amendment of the liability limit when the need arises. Under these amendment procedures, when an amendment is adopted by the contracting states, the amendment does not require an instrument of ratification by the parties to the Convention and will automatically enter into force within a period of time. The concept of a 'tacit acceptance procedure' is a very new in international law and it is intended to expedite the entry into force of an amendment by doing away with the ratification of the amendment by each state.[426]

---

[424] Online: Office of Response and Restoration, National Ocean Service, National Oceanic and Atmospheric Administration Homepage <http://response.restoration.noaa.gov/> (Followed the link 'photos of ships') (last modified: 17July 2001).
[425] Gauci, *supra* note 30 at 159.

There is nothing wrong with the procedure itself. However, while the original purpose of this procedure is to avoid a time-consuming amendment process, it serves quite the opposite purpose in the international oil pollution law. The tacit acceptance procedures under Conventions have so many steps that it would take at least eleven and half years to adopt a further increase once an increase has been adopted. For example, an increase in the maximum liability amount was adopted on 18 October 2000.[427] To adopt another increase within the present amendment procedures, the contracting States have to wait until the middle of 2012. The following description of the amendment procedure will make the point clear.

First of all, no amendment can be made within five years of a previous amendment's entry into force[428] and the 2000 amendment will come into force on November 1, 2003.[429] So, the proposal for a next amendment can be made in 2008. Second, there is a six-month compulsory interval between a proposal of an increase, by at least one quarter of parties, and the submission of the proposal to the IMO's Legal Committee.[430] Third, once the Legal Committee adopts the proposal, it requires eighteen months to be tacitly accepted.[431] Fourth, once accepted, it takes another 18 months to come into force.[432]

Besides the time consuming procedures, there are other hurdles with regard to the amount to be increased. First, the increase cannot be more than 6% of the 1992 amount per annum.[433] Second, under no circumstances, can the increase exceed three times the 1992 amount,[434] not even in 100 years!

---

[426] L. Shi, "Successful Use of the Tacit Acceptance Procedure to effectuate Progress in International Maritime Law", (1999) 11 University of San Francisco Maritime Law Journal 299 at 304-5.
[427] *Texts of the 1992 Conventions, supra* note 126 at 47 and 51.
[428] Liability Convention, Article 15.6(a) and Fund Convention, Article 35.6(a).
[429] *Texts of the 1992 Conventions, supra* note 126 at 47 and 51.
[430] Liability Convention, Art.15.2 and Fund Convention, Art.33.2.
[431] Liability Convention, Art. 15.7; Fund Convention, Art. 33.7.
[432] Fund Convention, Art.15.8 and Art.33.8.

C. The test to break the limit

The third problem of the present system is the test to break the right of shipowners to limit their liability. When the justification of this right itself is questionable,[435] the almost impossible burden of proof on a claimant to break the right is not justified at all. Under the original version of the 1969 Liability Convention, in order to take the advantage of the right, a shipowner had to prove that there was no 'actual fault or privity' on its part with regard to the cause of the incident.[436] The burden of proof was on the shipowner. Failure to prove the actual cause of the accident would not discharge the burden. In such a situation, the unseaworthiness of the ship was presumed.[437] The 1992 Protocol has changed the test.[438] It shifted the burden of proof to the claimants. So, a shipowner automatically gets the right to limit its liability, unless the claimant proves that "the pollution damage resulted from his [shipowner's] personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result".[439] In addition to shifting the burden, this test includes many other new legal elements like personal act, knowledge of the particular damage, recklessness and probability. These elements have made the shipowners' right to limit their liability practically unbreakable.[440]

---

[433] *Ibid.* Art. 15.6(b) and Art 33.6(b).

[434] *Ibid.* Art.15.6(c) and Art.33.6(c).

[435] The shipowner's right to limit liability "is not a matter of justice, it is a rule of public policy which has its origin in history and its justification in convenience." Per Lord Denning in *The Bramley Moore* [1963] 2 Lloyd's Rep. 429, at 437.

[436] Art.V.2 of the Liability Convention, 1969.

[437] Xia Chen, *Limitation of Liability for Maritime Claims: A Study of US Law, Chinese Law and International Conventions* (The Hague: Kluwer Law International, 2001) at 73 [hereinafter Chen].

[438] Liability Convention, Art.V.2: "The owner shall not be entitled to limit his liability under this Convention if it is proved that the pollution damage resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result."

Since the act or omission must be personal, it will no longer be possible for the courts to impute the fault or negligence of a master or crew as to a shipowner, even if it causes injustice to the victims of pollution. Under the previous test of 'actual fault or privity', courts could make shipowners liable for the fault or negligence of master or crew through the principle of vicarious liability. For example, in *The Lady Gwendolen,*[441] the privity of the marine superintendent of the shipowner company about a prior incident of the master's speeding in fog was imputed to the shipowner company, and accordingly the right to limitation was denied. This is no longer possible under the new test. If the shipowner is an individual, it must be his or her personal act or omission and if it is a corporation, the act or omission must be that of its directing minds (alter ego) such as its head or managing director.[442]

Besides being personal, the act or omission must be committed with the intent to cause the particular damage. It is almost unimaginable how a shipowner will intentionally cause a particular damage to the victims of oil pollution unless the shipowner is a criminal or potential criminal. It is also difficult to prove the intention as it 'involves exploration of complex human mind'.[443] This kind of condition is normally required in the element of *mens rea* in criminal law. Although a claimant has an alternative of proving recklessness rather than the knowledge of a shipowner, proving the alternative is almost as hard as the first option of proving intentional damage, because a reckless act alone is not enough to hold a shipowner liable beyond the Liability Convention limit. The reckless shipowner must have the knowledge that the particular damage would probably result. It is arguable that if a shipowner is reckless about the act but neutral about its consequence, it may still have the right to limit. Only when a shipowner is reckless about its act and aware of the probable consequence of the act will the shipowner be deprived of the right or privilege.[444] One may wonder how a person can be reckless about an act or omission but at the same time aware of its probable consequence, as the word 'reckless' means 'without thinking or caring about the consequences or the danger involved'![445]

---

[439] *Ibid.* Art.V.2.

[440] COM (2000) 802 final at 56.

[441] [1965] P.294; [1965] 1 Lloyd's Rep. 335 (Provate Division).

[442] Gauci, *supra* note 30 at 167-169.

All these elements have to be proved if the claimant is to obtain its full compensation in excess of the limited liability of shipowner. It is not the case that if a claimant can prove the test it will get more damages than were suffered. This test obviously causes injustice towards the victims of oil pollution in a case when their claims exceed the maximum available amount under the present law. That is why in the United Kingdom, the Report of Lord Donaldson's Inquiry into the Prevention of Pollution from Merchant Shipping in 1994 indicated that, in future, this test may prove to be an

---

[443] Chen, *supra* note 437 at 75.
[444] *Ibid.*
[445] Oxford Advanced Learner's Dictionary of Current English, 5th ed (Oxford University Press, 1995) at 973.

'unreasonable protection for reckless shipowners'.[446]

D. Channeling liability to shipowners only

This problem is somewhat related to the earlier problem. Channeling oil pollution liability to shipowners to the exclusion of any other person is not a problem itself. It, in fact, has some benefits. It obviates the need for multiple insurance for other parties who might probably be liable.[447] It makes it easy for a claimant to identify the source of redress.[448] Besides, the liability of the master, servants and employees would ultimately become the liability of shipowner through either vicarious liability or indemnities in employment contracts.[449] However, it is a problem in the international liability regime for oil pollution because of the almost impossible test to break the shipowners' liability limit. On one hand, the system allows no legal action for oil pollution against any person other than shipowners. On the other hand, it imposes an impossible task on a claimant to break shipowners' right of limitation in order to get full compensation, when the claimant's established claims exceed the liability limit.

A claimant, who wishes to bring an action against any other person, is required to pass the same test as the one to break the right of shipowner to limit liability, namely that the person committed a personal act or omission with the intention to cause the particular damage.[450] The 1992 Protocol to the Liability Convention not only imposed a difficult obstacle to actions against any other potentially liable person, but also extended this protection to the charterer, manager or operator of a ship and salvors.[451] This makes negligent charterers and salvors immune from any liability and deprives a pollution victim of any additional source of redress, in the event that damages exceed the shipowner's limit.

---

[446] Gauci, *supra* note 30 at 169.
[447] COM (2000) 802 final at 58.
[448] *Ibid.*
[449] Chen, *supra* note 437 at 10.
[450] Liability Convention, Article II (4).
[451] *Ibid.*

These provisions can be contrasted with the American OPA'90, under which the liability for oil pollution is also channeled to 'responsible party'[452] but a 'responsible party' is widely defined to include the owner, operator and a demise charterer of a vessel.[453] Each of these persons can be held jointly and severally liable, thus making available more sources of redress.[454] This protection is in addition to the easily breakable right of shipowners to limit their liability, as discussed above. So, the solution seems to be to return to the pre-1992 Protocol system,[455] under which only servants or agents of a shipowner were protected, and even they could be held liable without any need to prove their intentional personal act or omission.[456]

E. Environmental Damage

Recoverable environmental damage under the present international liability regime is limited to the economic loss arising from damage to the environment suffered by persons "who depend directly on earnings from coastal or sea-related activities, such as fishermen or hoteliers and restaurateurs at seaside resorts".[457] Governments can recover the cost to restore the damaged components of the environment,[458] clean up costs[459] and the assessment or study costs as long as they are reasonable and related to pollution damage.[460] The international system does not pay for the diminution value of the affected resource pending restoration or for the equivalent component of the impaired environment when restoration is not possible.[461] This is in contrast to the American law, the OPA'90, under which the recoverable damages include not only the restoration or replacement costs but also damages for lost use or the diminution in value of the affected element of the environment pending repair or replacement.[462]

---

[452] 33 USCA § 2702 (a).

[453] 33 USCA § 2701 (32).

[454] See *United States* v. *M/V Big Sam*, 681 F.2d 432, 1983 AMC 2730, 2739 (5th Cir. 1982); in particular at 438-39 where the court said, "As statutorily defined, the term "owner or operator" refers both to the owner and to the bareboat chartered, and thus in our opinion...affords the government a remedy against either or both." cited in Kiern, *supra* note 3 at 518.

[455] COM (2000) 802 final at 58.

[456] Liability Convention 1969, Article III (4). Compare Liability Convention 1992, Article III (4).

[457] *Claims Manual, supra* note 170 at 28.

[458] Liability Convention, Article I (6) (a).

[459] Clean-up costs fall under 'preventive measures', which also considered as 'pollution damage' under Article I (6) (b) of the Liability Convention.

[460] *Claims Manual, supra* note 170 at 29.

Theoretical and practical problems with regard to the ownership and valuation of damaged natural resources have been overcome to a great extent. Some valuation techniques have been developed to assess the value of the environment, when restoration is not possible.[463] Although the theoretical valuation methods are not 100% accurate, outright exclusion of them will leave environmental damage under-compensated, particularly when restoration is not possible. Therefore, the international system should be flexible in accepting the theoretical valuation methods, at least, as a last resort.

IV. The 2003 Protocol

The *Erika* oil spill on December 12, 1999,[464] has proved again that it takes a disastrous oil spill to make any substantial change in the international oil pollution liability regime. *Erika* broke in two in heavy seas off the coast of Brittany, France, on 12 December 1999 while carrying approximately 30,000 tonnes of heavy fuel oil. Some 14,000 tonnes of oil were spilled and more than 100 miles of Atlantic coastline were polluted.[465] Like its predecessors such as the *Torrey Canyon*, *Amoco Cadiz* and *Exxon Valdez*, *Erika* also stirred the international community to rethink the adequacy of the present oil pollution liability law. The place of the incident also has great significance in bringing any change. If it were not for the pristine coastline of Alaska, the *Exxon Valdez* would not have brought so dramatic change in the American oil pollution legislation. The *Erika* incident had a similar context. Since 1971, five major tanker spills have occurred at the same place.[466] The occurrence of the incident in French waters irritated not only France but the whole European Union (EU), which has the political muscle to bring changes in both the regional and international law dealing with oil pollution.

---

[461] COM (2000) 802 final, paragraph 4.4.4 at 58.

[462] 33 USCA § (d) (1).

[463] See discussion on Environmental Damage at p. 69-73.

[464] *Annual Report 2001:IOPC Funds, supra* note 9 at 108.

[465] Online: IMO Homepage <http://www.imo.org/InfoResource/mainframe.asp?topic_id=68&doc_id=550> (date accessed: 11 November 2002).

Fearing the European Union's denunciation of the inadequate international oil pollution liability regime,[467] the IMO Legal Committee increased the maximum liability ceiling by 50% on October 18, 2000. The new limit will be in force from November 1, 2003.[468] The Commission of the European Communities (CEC) was unhappy even with this increase[469] and adopted a 'Proposal for a Regulation of the European Parliament and of the Council on the establishment of a fund for the compensation of oil pollution damage in European waters and related measures' [hereinafter Proposal for COPE Fund].[470] In response to this European proposal and to avoid disintegration of the international system,[471] the IOPC Fund Assembly adopted a 'Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992 [hereinafter the Protocol].[472]

The Protocol proposes to create a third tier of liability for oil pollution over and above the existing liability limit. It was developed by the Third Inter-sessional Working Group of the IOPC Fund Assembly, set up in April, 2000.[473] The IMO Legal Committee approved the text of the draft Protocol at its 84th session held on April 22-26, 2002.[474] The Working Group and the Legal Committee left blank some important issues and figures such as the limit of the proposed third tier and the entry into force conditions. These issues were discussed and decided in the IMO Conference on May 12-16, 2003.[475] The Conference adopted the Protocol without any significant modifications in the draft Protocol. Although the French authorities demanded the ceiling to be as high as EUR 1 billion,[476] the Conference fixed the maximum liability for the supplementary fund at SDR 750 million (just over US$ 1 billion).[477]

---

[466] *SOPF: Annual Report 2000-2001, supra* note 6 at iii.
[467] *Ibid.* at vi.
[468] See *Texts of the 1992 Conventions, supra* note 126 at 47 and 51.
[469] *SOPF: Annual Report 2000-2001, supra* note 6 at iv.
[470] COM (2000) 802 final at 2000/0326 (COD) [hereinafter COM (2000) 802 final], online: EU Homepage <http://www.europa.eu.int/comm/dgs/energy_transport/library/erika2_en_final.pdf> (date accessed: 6 August 2002).
[471] *SOPF: Annual Report 2000-2001, supra* note 6 at iv and vii.
[472] For draft Protocol, see 92FUND/A.6/28, Annex I. For final Protocol, see LEG/CONF.14/20.

A. Problem to be solved by the Protocol: the inadequacy of the liability amount

The Protocol, when it comes into force, with the maximum SDR750 million liability limit will solve, to a great extent, the problem of inadequacy and, as a consequence, the delays in the payment of established claims. This amount will meet any foreseeable oil pollution liability, in the light of the two decades' experience of the international oil pollution liability regime. During the last two decades, no pollution incident caused damage of SDR750 million.[478] In fact, only a few of the incidents exceeded the maximum liability amount available under the existing international system. However, there is a caveat to the above statement. The present system has various restrictions as to the admissibility of claims. Claims have to fall under certain criteria in order to be admissible. For example, the polluting oil must be 'persistent oil'.[479] The international regime also does not cover spills from the bunker of non-tanker and 'mystery spills'.[480] Oil pollution from onshore or offshore facilities is not also covered under the international regime.[481] As a result, many claims following an oil spill, which may appear to the general public to constitute oil pollution damage, would not be so under international law. For example, out of all the oil spill incidents in Canada from 1993-2000, 88% of the spills were not admissible under the international oil pollution regime.[482]

---

[473] See *Annual Report 2001: IOPC Funds, supra* note 9 at 32-33.

[474] See newsroom of IMO, online: the IMO homepage <http://www.imo.org/home.asp> (date accessed: 10 August 2002).

[475] Press release of IOPC Fund Meetings April 2002, online: the IOPC Fund Homepage <http://www.iopcfund.org/npdf/April02news.pdf> (date accessed: 3August 2002).

[476] *SOPF: Annual Report 2000-2001, supra* note 6 at iii.

[477] Article 4 (2) of the Protocol.

[478] *SOPF: Annual Report 2000-2001, supra* note 6 at iii.

B. Problems not to be solved by the Protocol

The 2003 Protocol will not solve the other negative aspects of the international liability regime. Among these problems is the amendment procedure to increase the liability limit. The delegates in the 2003 IMO Conference realized the problem, but did not fully solve it. However, under the 2003 Protocol once the IMO Legal Committee adopts an increase it will take seven and half years to make a further increase in the supplementary fund,[483] whereas it takes eleven and half years to do the same under the present 1992 Conventions. Although the Protocol shortened the time limit to increase the liability limit of the Supplementary Fund, seven and half years is still quite long for an effective and fast increase, given the regular inflation of the world currencies.[484]

---

[479] Article I (5), the Liability Convention. 'Non-persistent oil' is defined as 'oil which , at the time of shipment, consists predominantly of non-residual fractions and of which more that 50% by volume distils at a temperature of 340 degrees Centigrade when tested by the ASTM Method D86/78 or any subsequent revision thereof.' See Gauci *supra* note 30 at 57.

[480] Article 4(2)(b); the Fund Convention; *SOPF: Annual Report 2000-2001, supra* note 6 at 41.

[481] See the definition of 'pollution damage' in Article 1(6) of the Liability Convention.

[482] *SOPF: Annual Report 2000-2001, supra* note 6 at ii.

[483] See article 24 of the 2003 Protocol.

[484] The present maximum limit of SDR 135 million (US$ 190 million) was actually adopted in the

Similarly, the problem of the almost unbreakable right of shipowners to limit their liability was not solved by the Protocol. This issue surfaced during the discussions of the Working Group.[485] The French delegation submitted a paper on the issue, seeking to change the test.[486] However, the discussion subsided because of the counter argument that return to previous test would not be possible and if done would not bring any practical benefit to victims of oil pollution because in most cases the 1992 fund pays any amount exceeding the shipowners' liability.[487] This is true when the total damages do not exceed the combined liability of shipowners and the IOPC Fund. However, if the claims exceed the combined amount, breaking the right to limit would enable the victims to get full compensation for the damage they suffer. It may be argued that a shipowner would not be able to pay more than its insurance limits and thus an easily breakable right to limit will just result in bankruptcy, if the right is broken. However, it is very unlikely as the P&I clubs give insurance to their members up to US$1 billion.[488] The liability regime should primarily be for the adequate compensation of pollution victims, not for the protection of negligent shipowners.

---

unsuccessful 1984 Protocol to the Fund Convention. The same amount was later incorporated in the 1992 Protocol. According to the Consumer Price Index, what could be bought by US$ 190 million in 1984 would cost US$ 337.75 million in 2003. Online: the Federal Reserve Bank of Minneapolis Homepage at <http://minneapolisfed.org/research/data/us/calc/> (date accessed: 14 July 2003).

[485] 92FUND/A.6/4; 92FUND/WGR.3/9, 9.1.1-9.1.8. at p.24-25.

[486] 92FUND/WGR.3/5/5.

[487] *Ibid.* 9.16-7 at p. 24 and 25.

[488] See 92FUND/A.6/4; 92FUND/WGR.3/9/7.1.9. p13. However, the French paper reveals that while under the previous test a claimant had the guarantee of getting full compensation from the insurers of ship owner (P&I clubs) after breaking the test; it is not possible now even if the test is broken. Because, the test in P& I Clubs' rules to deny ship owners insurance coverage for additional liability over and above the Liability Convention's limit, is the same as that of breaking the ship owner's limit of liability. Since the previous test to break the limit under the international law was more flexible than the P&I clubs' test to deny the coverage, deprivation of the right to limit did not automatically deprive ship owners and consequently claimants from the clubs' coverage above the Convention limit. So, now success in breaking the present almost unbreakable test brings no certainty for victims of oil pollution in getting full compensation. Their only resort is ship owners. (see *SOPF: Annual Report 2000-2001, Supra* note 6 at 35).

Shipping interests may now argue that the adoption of the Protocol would solve the problem of the inadequacy of the present liability system. Making it easier to break the shipowners' right to limit easily breakable would bring no benefit to the victims of oil pollution as they would be fully compensated any way, whether the shipowners' right to limit is broken or not. However, an easily breakable limit is still necessary for at least two reasons. First, all the Contracting parties to the Liability Convention may not be parties to the Protocol because of the high amount of compulsory contribution to the Supplementary Fund.[489] Second, the purpose of an easily breakable right to limit is not only to get full compensation for the victim, but also to provide incentives to shipowners to take extra care when transporting oil on their ships and to avoid pollution damage. The present practically unbreakable right does not provide such incentives. There is no liability on shipowners for their negligent acts or omissions for using sub-standard ships to carry oil.

Problems relating to channeling of liability and the scope of the environmental damage are also not addressed by the Protocol. These problems were discussed in detail earlier.

C. Various aspects of the Protocol

1. Adequate Compensation

As discussed above, adequate compensation is the main reason to adopt the new Protocol.[490] Although the present maximum compensation amount has proved adequate to meet most of the oil pollution damage in the last two decades, there were incidents where the amount fell short of the established claims. In order to provide compensation for any foreseeable oil pollution damage, the Supplementary Fund will work as a safety net. This will not only provide adequate compensation, but will also ensure fast recovery of full compensation in borderline cases i.e., when the claims seem to exceed the maximum compensation limit and consequently the IOPC fund has to prorate compensation for established claims.[491] However, there still may occur oil spill incidents which would exceed even the third tier limit and so the problem of pro-rating would arise together with its consequent problem of delay in paying compensation to the victims.[492] Such an incident is not impossibility if we examine the expenses the Exxon Shipping Co. had to bear after the *Exxon Valdez* incident,[493] the largest yet American history, although it was not the biggest oil pollution disaster in the world in terms of oil volume.[494]

---

[489] See *infra* in the following section under the subheading "*An insurance fund or liability fund?* at p. 100.
[490] See the preamble and Article 4(1) of the Protocol.

2. *An Insurance Fund or Liability Fund?*

Like the 1992 Fund, the Supplementary Fund will be financed by those who receive oil in the contracting States. Article 10 of the Protocol imposes a levy on an oil receiver of over 150,000 tons in a Contracting State. However, one significant difference between the two funds is that in the Supplementary Fund each contracting State has to contribute a minimum amount of money, whether any person in its territory receives the minimum quantity of oil or not.[495] Each State party to the Protocol is presumed to have received a minimum quantity of 1 million tons of oil for the purpose of calculating its contribution to the Supplementary Fund.[496] The responsibility to pay for any amount falling short of the presumed amount in a contracting State lies with the government of that State.[497] The purpose of this provision is to spread the burden of financial responsibility of the Supplementary Fund among all the contracting States.[498]

---

[491] The Protocol, Article 5.

[492] See *ibid.* Article 4(3).

[493] The economic cost to Exxon, federal and state government and other claimants has been estimated to exceed $12 billion. See Dagmar, Schmidt Etkin, *Financial Costs of Oil Spills in the United States* (1998) p.224; cited in Kiern, *supra* note 3 at 482.

[494] *The Exxon Valdez* disaster ranks currently 53 on the all-time list of major oil spills. Online: Office of Response and Restoration, National Ocean Service, National Oceanic and Atmospheric Administration Homepage <http://response.restoration.noaa.gov/photos/ships/07.html> (date accessed: 9 August 2002).

[495] The minimum quantity of oil for a person has to contribute is any amount exceeding 150,000 tons. See Article 10 of the Protocol.

The compulsory payment of a minimum presumed amount means that the Supplementary Fund is more like a mutual insurance fund than an international oil pollution fund. Any country which is not able to pay this amount will not be covered by the Fund. In this regard, the Protocol creates imbalance between the developed world, which would be able to pay high contributions, and the developing world, which could not afford to pay the minimum payment for presumed oil receipt and thus would have no chance to join the Supplementary Fund. On this point, the Protocol is not acceptable from the environmental point of view, because damage to environment in any where in the world should be rectified. Damage in one part of the world would indirectly affect other parts as well and could impair the overall quality of the world marine environment.

The Supplementary Fund thus substantially differs from the present international oil pollution liability regime where a State or its oil receivers pay contributions according to the amount of oil actually received, exceeding a minimum limit.[499] If an oil receiver in a State to the Fund Convention does not receive oil over the minimum amount, the receiver incurs no liability. Yet oil pollution damage in that State is covered by the 1992 Fund. For example, out of 62 State parties to the 1992 Fund Convention, 16 States did not pay any money to the 1992 Fund, since no oil company in these countries received oil over the minimum limit.[500] This is a balanced mechanism in the oil pollution regime to pay for oil pollution damage both in developed and developing countries, regardless of their ability to contribute to the 1992 Fund, because an oil spill incident would cause as much damage to a developing country as to a developed one.

---

[496] Article 14 (1) of the Protocol.

[497] Article 14(2).

[498] 92FUND/A.6/4; 92FUND/WGR.3/9, 7.2.26 at p. 19-20.

[499] The limit is 150, 000 tons. Article 10 (1), the Fund Convention.

[500] *Annual Report 2001:IOPC Funds, supra* note 9 at 165.

3. Non-submission of oil reports

Both the 1971 and 1992 IOPC Funds faced the problem of failure by some States to report their total oil receipts. Ten State parties to the 1992 Convention and sixteen State parties to the 1971 Convention did not submit reports in 2001.[501] As a result, the IOPC Funds were unable to levy on the oil receivers of those countries. To overcome this problem, the 2003 Protocol has provisions not to pay any compensation for oil pollution from the Supplementary Fund to pollution victims in the States which fail to submit the report regarding oil receipt.[502] However, if a State complies with its obligation to submit reports, compensation will be resumed to the victims, including the State itself for expenses it incurred regarding pollution damage. If no report is submitted within one year after the Director of the Supplementary Fund gives notice to the State about its failure to report, the State loses its right to compensation from the Fund.[503] It is not, however, very clear whether total failure is necessary to deprive a State of its right or minor deficiencies in the report would suffice for the application of the provision.[504] These provisions are necessary in order to ensure the availability of high compensation limit.

4. Optional Liability

The proposed Supplementary Fund is optional for the state parties to the Liability and the Fund Conventions. Although the ratification of the Protocol requires a State to be party to the above two Conventions, being a party to the above Conventions does not require the State to ratify the Protocol. This makes the Protocol acceptable to both the developed countries, which generally want large increases in the present ceiling of liability, and developing states, which find it unnecessary to have a Supplementary Fund over and above the present amount, particularly in the light of the IMO Legal Committee's decision in October 2000 to increase the present limit by 50.37% which would take effect from November 2003.[505]

---

[501] *Ibid* at 164-165.
[502] Article 15(2).
[503] Article 15(3) and see also, 92FUND/A.6/4; 92FUND/WGR.3/9, 7.2.28 at p.20.
[504] 92FUND/A.6/4; 92FUND/WGR.3/9, 7.2.29 at p.20

5. The Model of the 1992 Fund

The Supplementary Fund is modelled on the 1992 fund in terms of structure, administration, contribution mechanism, amendment procedure and the like. Most of the provisions in the Protocol are verbatim reproductions of the corresponding provisions in the 1992 Fund Convention. This creates the advantage that the experience of the 1992 Fund can be readily used in the application of the Supplementary Fund. It also preempts the problem of varying interpretation of new provisions by different courts and academic authors and it thus brings uniformity in the application of international law on the same subject. Familiarity with the existing law also makes the new Protocol reader-friendly. However, this mechanism is not free from disadvantages. Blind reproduction fails to address the deficiencies existing in the old law. As discussed earlier, the Protocol, when comes into force, would only rectify the problem of inadequate compensation in the existing system and consequently other problems, such as the amendment procedure for increasing the limit and the test to break the shipowners' right to limit liability, would continue to exist in the modified oil pollution regime.

---

[505] See 92FUND/A.6/4; 92FUND/WGR.3/9/7.1.2 and 3. at 13.

6. *Administration of the Supplementary Fund*

For administrative purposes, the Supplementary Fund will have its own Assembly and Secretariat.[506] Article 16 (2) and (3) integrates by reference into the Protocol all the provisions of the Fund Convention relating to the Assembly and the Secretariat of the 1992 Fund Assembly from Articles 17-20 and 28-33 respectively. The Assembly would meet once a year.[507] However, if there is no oil pollution incident in any contracting State to the Protocol exceeding or threatening to exceed the limit of the 1992 Conventions, meaning that the Supplementary Fund's involvement is not required, there will be no meeting in that year.[508]

Like the 1992 fund, the Supplementary Fund would be considered a legal person in the Contracting States and its director is treated as its legal representative.[509] Although the Supplementary Fund would be a separate legal entity, the Director and Secretariat of the 1992 Fund would act as the Director and Secretariat of the Supplementary Fund.[510] In the case of a conflict of interest between the 1992 Fund and the Supplementary Fund, the Chairman of the Assembly of the Supplementary Fund shall represent the Supplementary Fund.[511] In order to mitigate any difference, if it ever arises, regarding common administrative issues between the 1992 Fund Assembly and the Supplementary Fund Assembly, Article 17 (4) of the Protocol provides that "the Assembly shall try to reach a consensus with the Assembly of 1992 Fund, in a spirit of mutual co-operation and with the common aims of both organizations in mind".

7. *Definition of Various Terms*

---

[506] Article 16 (1) of the Protocol.
[507] Article 19 (1) of the 1992 Fund Convention.
[508] 92FUND/A.6/4; 92FUND/WGR.3/9,7.2.4 paragraph 4 at 16.
[509] Article 2(2) of the Protocol.
[510] Article 17 (1) of the Protocol; 92FUND/A.6/4; 92FUND/WGR.3/9,7.2.4 paragraph 4 at 16.
[511] Article 17 (2) of the Protocol.

Various terms in the Protocol are either verbatim reproductions of the Liability and Fund Conventions or incorporated from the Conventions simply by cross reference. This is to avoid duplication in the oil pollution liability regime. The definitions of "Ship", "Person", "Owner", "Oil", "Pollution Damage", "Preventive Measures" and "Incident" are the same as in the 1992 Liability Convention.[512] "Contributing Oil", "Unit of Account", "Ton", "Guarantor" and "Terminal installation" have the same meaning as that in the 1992 Fund Convention.[513] Besides, a claim would only be admissible under the Supplementary Fund if it is so in the 1992 Fund, but would exceed its limit.[514]

The geographical scope of the Protocol's application copies word by word Articles II and 3 of the 1992 Liability and Fund Conventions respectively; for pollution damage it is up to the Exclusive Economic Zone (EEZ) and an unlimited area for preventive measures.[515] A claim against the Supplementary Fund would be subject to same limitation periods and would be time-barred if it is so against the 1992 Fund.[516] All claims must be brought within three years from the date of damage, provided that the claim is within six years from the date of the incident.[517] However, if a claimant makes a claim against the 1992 Fund, it automatically becomes a claim against the Supplementary Fund if the involvement of the Supplementary Fund comes into play.[518]

8. Jurisdiction, recourse and final clauses

A court in which an action against a shipowner is brought has exclusive jurisdiction to decide any action against the Supplementary Fund, if the court is situated in a state which is party to the Supplementary Fund. If an action against a shipowner is brought before a court in a Contracting State to the 1992 Liability Convention, but not to the Supplementary Fund, an action against the Supplementary Fund can be brought before a court of the State where the Supplementary Fund has its headquarters or before any court of a State Party to the Supplementary Fund.[519] This situation may arise, when a single oil spill causes pollution damage or necessitates preventive measures in more than one State and any of these States is party to either the Liability Convention only or to both the Liability and Fund Conventions but not a party to the Supplementary Fund and the action against the shipowner was brought in such a State.

---

[512] Article 1 (6) of the Protocol.
[513] *Ibid* Article 1(7).
[514] See the definition of "Established claim" in Article 1 (8) and Article 4(4) of the Protocol.
[515] Article 3 of the Protocol.
[516] The Protocol, Article 6(1).
[517] 1992 Fund Convention, Article 6.
[518] The Protocol, Article 6(2).

The provisions in Article 9 of the 1992 Fund regarding the right of subrogation or recourse are reproduced in the Protocol so that similar rights are created for the Supplementary Fund, except that the latter fund also has this right against the earlier one.[520] Final clauses of the Protocol are almost identical to the 1992 Fund Convention, except Article 25, which gives the parties to the Protocol the right to increase the level of liability limits in the Supplementary Fund, to reflect any corresponding increase in the 1992 Fund, notwithstanding the various constraints on the amount of increase in the preceding provisions. The provisions in the final clauses of the Fund Convention are mirrored in those of the Protocol and they relate to the ratification,[521] entry into force,[522] amendment procedures for both the Protocol itself and the limit,[523] denunciation,[524] extraordinary sessions of the Assembly,[525] termination,[526] winding up of the

---

[519] The Protocol, Article 7(2) and (3).
[520] The Protocol, Article 9 (2).
[521] *Ibid.* Article 19.
[522] *Ibid.* Article 21.
[523] *Ibid.* Article 23 and 24 respectively. However, the time limit between different stages of an amendment to increase the liability in the Supplementary Fund is shorter than that of the 1992 Fund.
[524] *Ibid.* Article 26.
[525] *Ibid.* Article 27.
[526] *Ibid.* Article 28.

Supplementary Fund[527] and the depositary[528] and languages of the Protocol.[529]

V. Conclusion

The system of limitation in maritime law has outlived its justifications as the shipping industry is now strong enough 'not to require any discriminatory stimulant'.[530] Although the system has greatly been reformed in the case of oil pollution liability, following the many serious disasters in the last half century, it still needs some more changes. The adoption of the 2003 Protocol by the IMO Conference is a step in the right direction. It will help the oil pollution liability regime to achieve its main objective, i.e., adequate compensation for the victims of oil pollution. However, the Protocol still falls short of solving other existing problems in the present liability regime. Shipowners enjoy the practically unbreakable right to limit their liability. This right provides them no incentives to take extra care in the prevention of oil pollution as they can limit their liability even when their negligence or misconduct causes the oil pollution incident. The environmental damage provisions in the international regime do not reflect the growing national and international trend towards the better protection of the environment.

The IMO Conference gave the international community and the IMO to make the necessary amendments to the whole international liability regime, not just to adopt the Protocol to create the Supplementary Fund. However, the international community missed that opportunity. It would have been wise and time saving to have solved these problems in the Conference instead of waiting for another serious disaster to occur, when the problems would actually be felt. Such a pre-emptive step would have strengthened the base of the international oil pollution liability regime and have saved the integrity of the international system from future attack by the Contracting States by making country or region-wise legislation such as the EC's proposal to create the COPE Fund. The word of hope is that the existing problems in the international regime came to the notice of the delegates in the IMO Conference and the Conference adopted a resolution requesting the 1992 Fund Assembly review the 1992 Conventions for possible improvements.[531]

---

[527] *Ibid.* Article 29.
[528] *Ibid.* Article 30.
[529] *Ibid.* Article 31.
[530] Gauci, *supra* note 30 at 153.

---

[531] Conference resolution 3: Review of the international compensation regime for oil pollution damage for possible improvement. LEG/CONF.14/22.

CHAPTER FOUR

AMERICAN OIL POLLUTION LIABILITY REGIME

In response to the *Exxon Valdez* disaster, the largest oil spill ever in the US history, Congress enacted the long awaited comprehensive oil pollution law, the Oil Pollution Act of 1990 (OPA'90).[532] A decade after its enactment, the OPA'90 has proved to be better oil pollution liability regime than the counterpart international oil pollution liability regime, contrary to the dire forecasts of its opponents.[533] The most significant sign of its success is the European Union's proposal to take similar measures to remedy oil pollution damage in European waters. This does not mean the OPA'90 is flawless legislation. Being the best among the existing regimes does not necessarily imply that there is no room for improvements in the OPA'90.

This chapter analyses the pros and cons of the OPA'90. Following the same structure as the previous chapter, part I will discuss the various heads of recoverable damages under the OPA'90. Parts II and III focus on the description of the positive and negative aspects of the OPA'90 respectively. The chapter concludes that time has come for the international community as well as for the American authorities to merge the two main oil pollution regimes, i.e., the international regime and the OPA'90, thus consolidating the salient provisions of each in order to have a uniform international legal solution to the international oil pollution problem.

I. Recoverable Damage

---

[532] P.L. 101-380.

[533] S.R.Swanson, "OPA 90 + 10: The Oil Pollution Act of 1990 After Ten Years", (2001) J. Mar. L. & Com. 135 at 140-1 [hereinafter Swanson].

B. Physical Damage

Physical damage is recoverable in every legal system, whether common law or civil law. It is also recoverable under the international liability regime and the OPA'90. The reason for undisputed recovery of such damage may be its easily noticeable connection with the polluting substance. People experience a greater sense of loss with tangible injury, such as personal injury or property damage, than with expectation losses such as loss of business or income without any damage to their person or property.[534] On the other hand, non-physical damage i.e., pure economic loss such as damage to local businesses, though often greater, does not have such close connection and is thus not generally recoverable under common law.[535]

The physical damage can be of two types: damage to person and damage to property. Recoverable physical damage, in an oil spill situation, is mainly damage to real or personal property. Such damage is expressly included in s. 1002 (b) (2) (B) of the OPA'90.[536] Physical damage to a person i.e., personal injury does not appear to be recoverable under the OPA'90 as it is not included in any of the six heads of damages.[537] Therefore, a person who suffers any disease because of coming into contact with polluted water may not get any recovery under the OPA'90, despite the fact that the disease was caused by the polluted oil. However, damage to the person may be indirectly recoverable in one instance under the OPA'90, where the government spends money for such physical injury or health hazard under the head of 'Public Services'.[538] In addition, a person suffering physical injury may also recover the damages under the general maritime law of tort.[539]

---

[534] D. Cohen, "Bleeding Hearts and Peeling Floors: Compensation for Economic Loss at the House of Lords" (1984) 18 U.B.C.L. Rev. 289 at 304-5.

[535] This is not the reason given by the courts against the recovery of pure economic loss. The main reason is the fear of "liability in an indeterminate amount for an indeterminate time to an indeterminate class". Per Cardozo C.J. in *Ultramares Corp.* v. *Touche*; 174 N.E. 441 (N.Y.C.A. 1931) at 444.

[536] 33 USCA § 2702 (b) (2) (B) "REAL OR PERSONAL PROPERTY–Damages for injury to, or economic losses resulting from destruction of, real or personal property, which shall be recoverable by a claimant who owns or leases that property."

[537] Six heads of damages are: those of 1) natural resources, 2) real or personal property, 3) subsistence use, 4) revenues, 5) profits and earning capacity and 6) public services.

C. Economic Loss

Economic loss following any physical damage to real and personal property is also expressly recoverable as damages.[540] In *South Port Marine, LLC* v. *Gulf Oil Ltd. Pshp.*,[541] the plaintiff recovered compensation for loss of profit due to damage to its marina by spilled gasoline. Total loss or destruction of property is not necessary in order to recover damages; partial destruction or damage would suffice.[542] The recognition of this kind of economic loss does not make the OPA'90 much different from the general maritime law of tort. The revolutionary factor of the OPA'90 is the recovery of pure economic loss, which is loss not following from any damage or destruction to proprietary interest. Thus the OPA'90 overrides the well-known decision in *Robins Dry Dock*,[543] where the United States Supreme Court held that absent physical injury, damages for pure economic loss were not recoverable in admiralty tort actions.

Pure economic loss can be recovered as damages under two subheadings of the

---

[538] 33 USCA § 2702 (b) (F).

[539] This is when the person can prove negligence on the part of shipowner in discharging the oil and the discharge is the proximate cause of the disease. See discussion on negligence in Chapter Two at 31-5.

[540] 33 USCA § 2702(b) (2) (B).

[541] 73 F. Supp. 2d 17, 2000 AMC 658 (US District Court for the District of Maine 1999), affirmed in part, reversed in part and remanded, 234 F.3d 58, 2000 U.S. App. LEXIS 31178, 2001 A.M.C. 609, 51 Env't Rep. Cas. (BNA) 1749, 31 Envtl. L. Rep. 20344 (1st Cir. Me. 2000).

[542] *Ibid.* at 19.

[543] *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U.S. 303, 1928 AMC 61 (US Supreme Coourt 1927); Per Justice Holmes, " a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other, unknown to the doer of the wrong." at 309.

OPA'90: 'Subsistence Use'[544] and 'Profits and Earning Capacity'.[545] Under subsistence use, a person whose means of subsistence is derived from natural resources is able to recover damages for loss and suffering due to oil pollution. Such persons are mainly fishermen. Even before the enactment of the OPA'90, fishermen were considered a special category for the purpose of damage recovery and an exception to the *Robins Dry Dock* principle.[546]

Under the second heading of 'Profits and Earning Capacity', recoverable economic loss includes not only the economic loss consequential to damage or destruction to personal or real property, but also the economic loss consequential to the destruction of or damage to natural resources, over which no person has proprietary interest. Thus many kinds of pure economic loss, such as those which might be suffered by hoteliers and restaurateurs, tourist companies and the tourism industry that are generally recoverable under the OPA'90. Despite the clear provisions, some courts are hesitant in allowing damages for pure economic loss. For example, in *Petition of Cleveland Tankers, Inc.*,[547] the plaintiffs' business suffered due to the closure of a channel following an oil spill. The plaintiffs sought recovery of damages under the above two headings. Since their dependence on the channel (natural resources) was not for subsistence use but for commercial use, they could not recover under the first heading.[548] The court also did not allow recovery under the second heading on the ground that there was no damage to their property;[549] although under the second heading i.e.; 'PROFITS AND EARNING CAPACITY' it is categorically mentioned that injury to natural resources is enough to claim for economic loss.

---

[544] 33 USCA§ 2702 (b) (2) (C).
[545] 33 USCA§ 2702 (b) (2) (C).
[546] See *Union Oil Co.* v. *Oppen*, 501 F. 2d 558, 1975 AMC 416 (9th Cir. 1974), where the fishermen were awarded damages for oil pollution damage.
[547] 791 F. Supp. 669, 1992 AMC 1727 (US District Court for the Eastern District of Michigan, Southern Division 1992); cited in Swanson, *supra* note 533 at 153.
[548] *Ibid.* at 678.

The defect in *Cleveland* was recognized in *Ballard Shipping Co.* v. *Beach Shellfish.*[550] Disagreeing with *Cleveland,* the First Circuit in *Ballard* held that Congress intended the recovery of pure economic loss under 33 USCA § 2702 (b) (2) (E) in the OPA'90. This intention is manifest from the House Conference Report which provides that 'the claimant need not be the owner of the damaged property or resources'.[551] Similarly, in *Sekco Energy, Inc.* v. *M/V Margaret Chouest,*[552] the recovery of pure economic loss due to the halting of plaintiff's drilling operation in the Gulf of Mexico during an oil spill investigation was recognized under the second heading.[553]

Since there is no condition of 'contamination' or 'proximity' in order for economic losses to be recoverable in the OPA'90 as there is in the international regime, loss of profits to the fish importer and exporter and fish processing companies will be admissible, even if their place of business is not near to the contaminated area. So, if the case *Landcatch Ltd.* v. *International Oil Pollution Fund,*[554] were decided under the OPA'90, the salmon business company might have obtained judgment in its favor and have recovered for its loss of business, as the loss was due to damage to the natural resource of seawater.[555]

---

[549] *Ibid.* at 678-9.

[550] 32 F.3d 623, 1994 AMC 2705 (1st Cir. 1994); cited in Swanson, *supra* note 533 at 154.

[551] H.R. Conf. Rep. No. 101-653, 101st Cong., 2d Sess. 103 (1990); cited in Swanson, *supra* note 533 at 154.

[552] 820 F. Supp. 1008, 1994 AMC 1515 (US District Court for the Eastern District of Louisiana 1993).

[553] However, the claim was denied for lack of proximate cause between the loss and the spill.

[554] [1999] 2 Lloyd's Rep. 316 (Scotland Second Division Inner House Court of Session).

Foreseeability of damage is not a necessary condition for damage recovery for pure economic loss under the OPA'90. It thus appears that all kinds of economic losses, close or remote, are admissible at least in theory, if not in practice. In other words, the mere 'but for' test would suffice to establish a causal connection between the spill and the pure economic loss. This is a radical development in the oil pollution liability regime as pure economic loss is not recoverable in common law and restrictively available in the international regime. Loss of government revenues and cost of additional public services during or after the removal activities are also recoverable under the OPA'90.[556] Lastly, recovery for the cost of public services from a responsible party as provided under the head of 'Public Service' represents a departure from traditional tort law as such costs are normally borne by the public at large rather than the tortfeasor.[557]

D. Environmental Damage

Damage to the environment or natural resources can be divided into two categories: removal costs and non-removal costs. Removal costs include monitoring costs. The task of monitoring is normally done by the U.S Coast Guard and the costs of monitoring can be enormous. For example, monitoring the 1991 *Hyundai no 12* oil spill in Alaska, the 1993 Tampa Bay oil spill and the 1996 *North Cape* oil spills in Rhode Island cost over US$1, 1.7 and 3.4 million respectively.[558]

---

[555] The facts and decision of the case was fully discussed in Chapter Two at 58.
[556] 33 USCA § 2702 (b)(2)(D) and (F).
[557] Kim, *supra* note 129 at 102.
[558] Kiern, *supra* note 3 at 533.

Although the OPA'90 does not expressly include monitoring costs under removal costs, it is now settled law that such costs are an integral part of removal costs.[559] In *United States* v. *Conoco*,[560] Conoco had to pay for the Coast Guard's monitoring of two spills that occurred from its pipelines in the Gulf of Mexico. In that case, the court considered whether monitoring would be construed as "removal" for the purpose of assessing removal costs, removal being defined as the "containment and removal of oil or a hazardous substance from water and shorelines or the taking of other actions as may be necessary to minimize or mitigate damage...."[561] The court held that monitoring was "to minimize or mitigate damage" and rejected Conoco's contention that for the recovery of removal cost the Coast Guard had to be involved in the direct removal action not mere monitoring of the removal action. Similarly, in *United States* v. *Hyundai Merchant Marine Co.*,[562] the Ninth Circuit allowed the recovery of the Coast Guard's monitoring costs on the ground that the monitoring amounted to an attempt to mitigate or prevent a threat of discharge.

In order for removal costs to be recoverable, discharge or the threat of discharge of oil must occur into navigable waters or adjoining shorelines of the United States. In *Gatlin Oil Co.* v. *U.S.*,[563] where a vandal caused discharge of oil from the plaintiff's storage tanks by opening the valves of the tanks, the plaintiff failed to recover removal expenses from the Oil Spill Liability Trust Fund (in short, OSLTF) for preventing the spread of oil on soil and in underground water. This is because the discharge or threat of discharge was not into navigable waters.

---

[559] See *United States* v. *Conoco*, 916 F. Supp.581, 1996 AMC 872 (US District Court for the Eastern District of Louisiana 1996); *United States* v. *Murphy Exploration and Production Co.*, 939 F. Supp 489, 1996 AMC 2883 (US District Court for the Eastern District of Louisiana 1996) and *United States* v. *Hyundai Merchant Marine Co.*, 172 F. 3d 1187, 1999 AMC 1521 (9th Cir. 1999), *cert. denied*, 528 U.S. 963 (1999).

[560] 916 F. Supp.581, 1996 AMC 872 (US District Court for the Eastern District of Louisiana 1996).

[561] 33 USCA 2710(30).

[562] 172 F.3d 1187, 1999 AMC 1521 (9th Cir.), cert. denied, 528 U.S. 963 (1999).

[563] 169 F.3d 207 (4th Cir. 1999).

Non-removal costs for damage to natural resources include the costs of restoration or replacement and lost use value of natural resources pending restoration and assessment costs. With regard to this aspect of damage to natural resources, the OPA'90 has enacted some fundamental changes. Damage to natural resources has been put on the same footing as property damage by providing for the recovery of damages for lost use of natural resources in addition to recovery of restoration costs.[564] The lost use of natural resources can be of two types: actual use value and non-use value. Actual use value is the loss of actual use of the resources.[565] Non-use value is the appreciative value of the natural resources to persons who never use, or have no plan to use the resources, but nevertheless appreciate their existence.[566] Damages for lost actual use value can be measured through market-based methods like fees paid for the use of natural resources for activities like hiking, swimming, camping and the like.[567] The assessment of damages for the latter type of lost use is a very controversial and contentious issue among lawyers and economists. Damages for non-use value of natural resources are calculated by various methods. The most notable among them is the CVM. Under this method the non-use value of natural resources is assessed from the result of a survey on the hypothetical question of how much the survey participants are willing to pay for the resource in question.

---

[564] 33 USCA § 2702 (b) (2) (A).
[565] Swanson, *supra* note 533 at 156.
[566] *Ibid.*
[567] Montesinos, *supra* note 360 at 50.

The OPA'90 authorizes the President [through the National Oceanic and Atmospheric Administration (NOAA)] to promulgate regulations on the assessment of natural resources damage.[568] NOAA promulgated its final rules in 1996.[569] The rules authorize trustees to use any appropriate valuation technique in assessing the natural resources and in an appendix to the rules, CVM is considered as one possible technique.[570] The use of CVM as a valuation technique was challenged by the oil industry in *General Electric Co.* v. *United States Department of Commerce* as arbitrary and capricious.[571] However, the court rejected the argument and held that a properly performed CVM would prove useful and reliable.[572]

Given these various categories of damages, the cost for polluting natural resources can be astronomical; thus it arguably creates huge incentives in the mind of shipowners to take extra care when carrying oil in American waters. When the non-use value is considered in calculating natural resource damages, the environmental damage is assessed, in fact, more favorably than property damage. This is because in assessing property damage, there is no consideration for non-use value. However, this may be justified, given the severe consequences of environmental damage following oil pollution. Property damage affects only the individual owners, while the damage to environment may affect generation after generation.

---

[568] 33 USCA § 2706(e) (1).
[569] 15 C.F.R. §§ 990.10-990.66.
[570] Swanson, *supra* note 533 at 156.
[571] 128 F.3d 767, 772 (US Court of Appeals for the District of Columbia Circuit 1997).
[572] *Ibid.* at 773-4.

II. Positive Aspects of the OPA'90

A. Better Compensation

The OPA'90 provides the best compensation mechanism so far among all the existing and past oil pollution regimes. It provides compensation for pure economic loss in almost all cases, a benefit which is not available under the common law and available only subject to restrictions in the international regime. For example, an importer of fish from a polluted region does not have any remedy in common law for loss of profits due to lack of fish-catch in an area affected by an oil spill as it does not have any proprietary interest in the sea or in wild fish. The importer will also be unable to get any compensation from the international regime because its place of business is not generally close to a contaminated area or its business does not form an integral part of the economic activity within an area affected by oil spill. Under the OPA'90, the importer is likely to recover for its pure economic loss.

Besides widening the scope of recoverable damages, the OPA'90 has greatly increased the liability limits of a responsible party when compared to the international regime. Under the international regime, for a ship with 5000 tons, the maximum liability can be SDR 3 million (US$3.95 million). SDR 420 (US$554)[573] is added for each additional ton over 5000 tons. However, the total liability cannot exceed SDR 59.7 million (US$78.79 million).[574] On the other hand, the OPA'90 imposes as a ceiling of liability on a tanker exceeding 3000 tons, the *greater* of US$1,200 per ton or US$10 million.[575] If we covert this aggregate figure into per ton liability, the liability for a 10,000 ton ship would be SDR 720 ($950) under the international law and $1,200 under the OPA'90. The bigger the ship (tanker and non tanker) the lesser the average liability under the international law as the liability is assessed on a descending scale. On the other hand, it can never be less than US$1,200 per gross ton.

---

[573] As of October 11, 2002, SDR1=US$1.319800.

[574] Liability Convention, Article V(1)(b).

However, in the case of smaller ships the average per ton liability would be higher under the international law. For example, for a 500 ton ship the average per ton liability would be US$4000 under the OPA'90, but US$7919 (SDR 6000) under the international regime. When a tanker's total gross tonnage is about 3,333, the international liability limit and the limit under the OPA'90 converge at US$1200. After that, the liability curve of international regime goes downward from that of the OPA'90. As tonnage increases, the difference in liability limit between the OPA'90 and the international regime widens. It is noteworthy, however, that the international regime treats both tanker and non-tanker vessels on the same footing for the purpose of assessing the limit of liability, while the OPA'90 sets lower limits of liability for non-tanker vessels.[576] Yet, non-tanker liability under the international regime arises only when it actually carries persistent "oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage."[577] It is therefore implicit that oil pollution from the bunker of a non-tanker, when it is not actually carrying oil, is not recognized under the international regime.[578]

---

[575] 33 USCA §2704 (a)(1)(A) and (B)(i).

[576] See 33 USCA § 2704 (a) (2). It is the greater of $600 per gross ton or $500, 000.

[577] Liability Convention, Article I (1).

[578] *SOPF: Annual Report 2000, supra* note 6 at 41.

Tons	**OPA'90** (average per ton)	**CLC'92**[579] (average per ton)
500	$4000[580]	SDR6000 ($7919)[581]
1000	$2000	SDR3000 ($3959)
1500	$1555	SDR2000 ($2639)
2000	$1200[582]	SDR1500 ($1979)
2500	$1200	SDR1200 ($1583)
3000	$1200	SDR1000 ($1319)
3500	$2857[583]	SDR857 ($1131)
4000	$2500	SDR750 ($990)
4500	$2222	SDR666 ($879)
5000	$2000	SDR600 ($791)
5500	$1818	SDR(545+420)=965 ($1273)[584]
6000	$1666	SDR(500+420)=920 ($1214)
6500	$1538	SDR(461+420)=881 ($1163)
7000	$1428	SDR(428+420)=848 ($1119)
7500	$1333	SDR(400+420)=820 ($1082)

---

[579] Liability Convention, 1992 is popularly known as CLC'92.
[580] This arrived at by dividing US$2 million by 500 tons.
[581] This figure is arrived at by dividing SDR3 million by 500 tons.
[582] In a case of vessel with 3000 or less tons, the liability is greater of $1200 or 2 million. See, 33 USCA§§2704(a)(1)(B)(ii).
[583] For vessel with more than 3000 tons, the liability is the greater of $1200 or 10 million. See, 33 USCA§§2704(a)(1)(B)(i).
[584] For a ship with tonnage exceeding 50000, SDR420 is added for each additional ton over and above SDR3 million. See, Article V (1)(b) of the Liability Convention.

8000	$1250	SDR(375+420)=795 ($1049)
8500	$1200	SDR(352+420)=772 ($1019)
9000	$1200	SDR(333+420)=753 ($994)
9500	$1200	SDR(315+420)=735 ($970)
10000	$1200	SDR(300+420)=720 ($950)

Although the international regime imposes higher liability limit for smaller ships, this is not a very significant matter, given the fact that the average oil tanker is 50,000 gross tons.[585] In addition, the OPA'90 has a stronger mechanism for securing the liability of shipowners as it requires a Certificate of Financial Responsibility (COFR) from any vessel over 300 gross tons.[586] On the other hand, the parallel provision in the international regime requires ships to carry such certificate when its tonnage is over 2000 gross tons.[587] However, the IOPC Fund pays the oil pollution damages in case of the financial incapability or insolvency of a shipowner.[588]

B. Wider Scope of Liability

1. Scope of Polluting Substances and the Sources

Unlike the international regime, the application of the OPA'90 in terms of polluting substances is not limited to 'persistent oil', but is wide enough to cover both persistent and non-persistent oil. It also covers non-petroleum oil such as animal oil and vegetable oil,[589] while the international regime covers only hydrocarbon mineral oil.[590]

---

[585] Kiern, *supra* note 3 at 513.
[586] 33 USCA § 2716 (a) (1).
[587] Liability Convention, Article VII (1).
[588] Fund Convention, Article 4 (1) (b).

The OPA'90 is also wider than the international regime with regard to the source of pollution as it includes not only ships but also offshore and onshore facilities. The word 'ship' is not used in the OPA'90; instead the word 'vessel' is used. 'Ship' is defined in the Liability Convention as "any sea-going vessel and sea borne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo, provided that a ship capable of carrying oil and other cargoes shall be regarded as a ship only when it is actually carrying oil in bulk as cargo and during any voyage following such carriage unless it is proved that it has no residues of such carriage of oil in bulk abroad."[591] So, the definition does not cover a non-tanker when it is not actually carrying oil in bulk.[592] 'Vessel', on the other hand, is defined in the OPA'90 to mean "every description of water craft or other artificial contrivance used or capable of being used, as a means of transportation on water, other than public vessel".[593] It follows therefore that any thing capable of transporting oil is a vessel whether it is a tanker or non-tanker, self-propelled or not.

2. *Responsible Party*

While the international liability regime imposes entire initial liability on the shipowner,[594] the OPA'90 does so on the 'responsible party'.[595] 'Owner' in the international regime is narrowly defined to include only the registered owner or, in the absence of registration, the person or persons owning the ship. No other person such as the charterer, manager, operator, crew and other employee of a ship can be sued for oil pollution damage either under international law or any other law,[596] "unless the damage resulted from their personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result."[597] In other words, non-owners can only be held responsible, if they are liable for an act or omission, which, if done by an owner, would deprive it of its right to limit liability. On the other hand, under the OPA'90, the 'responsible party' for a polluting vessel means owner, operator and demise charterer of the vessel.[598] All these persons can be jointly and severally liable.[599] Financial responsibility regulation under the OPA'90 provides as follows,

---

[589] 33 USCA § 2701 (23) defines oil as "oil of any kind or in any form, ..."

[590] Article I (5) of the Liability Convention defines oil to mean "any persistent hydrocarbon mineral oil such as crude oil, fuel oil, heavy diesel oil and lubricating oil, ..."

[591] Article I (1).

[592] A new Convention was adopted in 2001 to address the problem of bunker oil spill: International Convention on Civil Liability for Bunker Oil Pollution Damage, 2001. It is very unlikely for the Convention to come into force soon because of the entry requirement of eighteen States, including five States each with ships whose combined tonnage is not less than one million gross tons. See *SOPF: Annual Report 2000-2001 supra* note 6 at 41.

[593] 33 USCA § 2701 (37).

> "The owner, operator, and demise charterer are strictly, jointly, and severally liable for the costs and damages resulting from an incident or a release or threatened release..."[600]

However, one COFR (Certificate of Financial Resposibility) would suffice for all these persons. Financial responsibility regulations under the OPA'90 further provide,

---

[594] Article III (4) of the Liability Convention.
[595] 33 USCA § 2702 (a).
[596] Article III (4) of the Liability Convention.
[597] *Ibid.*
[598] 33 USCA § 2701 (32).
[599] See *United States* v. *M/V Big Sam*, 681 F.2d 432, 1983 AMC 2730, 2739 (5th Cir. 1982); in particular at 438-39 where the court said, "As statutorily defined, the term "owner or operator" refers both to the owner and to the bareboat charterer, and thus in our opinion...affords the government a remedy against either or both." cited in Kiern, *supra* note 3 at 498.
[600] 33 Code of Federal Regulation (C.F.R.) § 138.30 (a) (2002).

> "...but together they [the owner, operator, and demise charterer] need only establish and maintain an amount of financial responsibility equal to the single limit of liability per incident, release, or threatened release."[601]

Furthermore, the regulations provide that an operator may hold such certificate on behalf of all. It is presumed however that an owner or demise charterer can also do so, regardless of their status as operator or not. The relevant provision states that,

> "...an operator of a vessel may establish and maintain, for itself, and, where the operator is not the owner or demise charter, for the owner and demise charterer of the vessel, evidence of financial responsibility to cover liability of the owner, operator, and demise charterer..."[602]

Therefore, where the right to limitation applies, the maximum amount would not exceed the limit, even though the responsible persons are severally liable, and there will be only one limitation fund under the OPA'90. At first sight there may seem to be no real difference between the international regime, which channels liability only to the shipowner, and the OPA'90, which has multiple responsible parties. However, if a shipowner appears judgment proof, there would be no additional source of redress under the international regime, while the OPA'90 provides for an alternative responsible party. This issue may be purely academic however considering the compulsory insurance or proof of financial responsibility up to the limited liability amount.

One COFR for all the responsible parties may also render ineffectual any discussion of exceeding the liability limit, as there is no guarantee that a party will be able to meet the additional liability. However, a COFR is meant to provide the proof of the maximum liability in cases where a shipowner avails itself of the right to limit its liability. When the right is denied, the liability becomes unlimited. It is not practically possible to have a COFR with unlimited liability as no insurance company would write such a blank cheque, especially for oil pollution cases where liability can some times exceed a billion dollars.[603]

---

[601] *Ibid.*

[602] 33 C.F.R. §138.10 (2002).

Since there is no restriction in the OPA'90 to bringing an action for oil pollution against any other party other than the responsible party, the master, crew or other servants of the vessel may be sued and held responsible for their act or omission causing or contributing to the oil pollution damage. Imposing liability on persons other than shipowners can bring an additional source of redress when claims exceed the shipowners' liability limit. However, a judgment against them may prove useless, as there is no financial guarantee to meet their liability. An action against them can only be brought under the general maritime tort law,[604] as they are not considered 'responsible parties' under the OPA'90.

C. Easily Breakable Test

---

[603] For example, in *Exxon Valdez*, only the clean up cost the Exxon Mobil Co. US$ 2.1 billion, in addition to its payment of $ 1.25 as a settlement for government claims. Claims by the private individuals are still being litigated and have not been resolved yet. Online: *Exxon Valdez* Oil Spill Trustee Homepage <http://www.oilspill.state.ak.us/> (date accessed: 21 July 2002).

[604] Such as negligence, trespass, nuisance etc. However, gross negligence on the part of an employee will break the right of a ship owner to limit liability. Although 'gross negligence' is not defined, it was held in *National Shipping Co.* v. *Moran Mid-Atlantic Corp.* 924 F. Supp. 1436 (US District Court for the Eastern District Court for the Eastern District of Virginia, Norfolk Division. 1996), aff'g, 1998 A.M.C. 163 (4th Cir. 1997) that it must be more than ordinary negligence. Opposing to the standard of gross negligence instead of simple negligence, House Representative from California Mr. Miller referred to Prosser on Torts and stated, "...gross negligence as the failure to exercise even that care which a careless person would use." Similarly, Mrs. Kenneally of Connecticut stated that in a gross negligence it has to be proved that the responsible party did the negligent act knowingly and intentionally. See 135 CONG. REC. H 8157, at 8157and at H 8165. If this interpretation is taken, there would be no difference between the OPA'90 and the international regime on this issue. For further discussion see G. M. Chalos, "A Practical Guide to the Oil Spill Liability Trust Fund Claim Submission Procedures", (1999) 3 U. Denv. Water L. Rev. 80 at 92-93.

Notwithstanding that under the OPA'90 shipowners enjoy the right to limit their liability, the right is easily breakable compared to the almost unbreakable test under the international regime. In the OPA'90, the right is lost if an oil spill incident is proximately caused by:

- "gross negligence or willful misconduct of, or
- the violation of any applicable Federal safety, construction, or operating regulation by the responsible party, an agent or employee of the responsible party, or a person acting pursuant to a contractual relationship with the responsible party (except where the sole contractual arrangement arises in connection with carriage by a common carrier by rail)."[605]

Breach of one regulation or another can almost always be proved in an oil pollution case, as there are numerous regulations with regard to the safety, construction and operation of a vessel.[606] However, violation of any regulation per se would not cause a shipowner to lose the right to limit liability; the violation must be the proximate cause of the incident.[607] On the other hand, the international regime denies a shipowner's right to limited liability only when "the pollution damage resulted from his personal act or omission, committed with the intent to cause such damage, or recklessly and with knowledge that such damage would probably result."[608] As discussed earlier,[609] it is almost impossible for a claimant, upon whom the burden of proof lies, to break this test.

Exoneration from liability under the OPA'90 is limited to an act of God, an act of war or an act or omission of a third party.[610] They work as complete defenses. However, to take the advantage of the last mentioned defense a responsible party has to prove that it "(A) exercised due care with respect to the oil concerned, taking into consideration the characteristics of the oil and in light of all relevant facts and circumstances; and

---

[605] 33 USCA § 2704 (c) (1) (a) and (b).

[606] See Title 33 of C.F.R. : NAVIGATION AND NAVIGATIONAL WATER.

[607] 33 USCA § 2704 (c) (1): "...if the incident was *proximately* caused by [any of the above factors]." [Emphasis added].

[608] Article V (2) of the Liability Convention.

[609] See the Chapter Three, section III (C) at p. 86.

(B) took precaution against foreseeable acts or omissions of any such third party and the foreseeable consequences of those acts or omissions."[611]

A responsible person will lose the above defenses if it fails or refuses--

- "to report the incident as required by law and the responsible party knows or has reason to know of the incident;
- to provide all reasonable co-operation and assistance requested by a responsible official in connection with removal activities; or
- without sufficient cause, to comply with an order issued under subsection (c) or (e) of section 311 of the Federal Water Pollution Control Act (33 U.S.C. 1321), as amended by this Act,[612] or the Intervention on the High Seas Act (33 U.S.C. 1471 et seq.)."[613]

It is not clear whether a failure to comply with any of the above duties would deprive a responsible party also of the right to limit liability. Since such a failure would impose liability in exonerating situations, they should not also attract unlimited liability in these situations. The initial causes of oil spills in these situations are beyond the control of a responsible party.

Unlike the international regime, the OPA'90 also covers oil pollution from onshore and offshore facilities.[614] It is also worth mentioning here that the right to limitation does not apply to the removal costs of oil discharged from Outer Continental Shelf (OCS) facility or any vessel carrying oil as cargo from such facility.[615]

---

[610] 33USCA § 2703 (a)(1)-(3).

[611] 33 USCA § 2703(a) (3)(A) and (B).

[612] Subsection (c) deals with removal order under the National Contingency Plan and subsection (e) deals with civil enforcement orders in order to protect public health.

[613] 33 USCA § 2703 (c) (1)- (3).

D. More Environmentally Friendly

Protection of the environment is of great significance under the OPA'90. Natural resources are mentioned as the very first type of damages under the heading of recoverable damages. As discussed earlier, the cost of restoration of natural resources as well as damages for the lost use of natural resources are recoverable under the OPA'90. A whole section (S. 1006)[616] is dedicated to the various issues relating to natural resources. Under this section, damages for natural resources include:

a. "the cost of restoring, rehabilitating, replacing, or acquiring the equivalent of, the damaged natural resources;

b. the diminution in value of those natural resources pending restoration; plus

c. the reasonable cost of assessing those damages."[617]

These are in addition to the removal costs, which are separately mentioned under s.1002 (b) (1) (A) and (B).[618] The most controversy with regard to natural resources lies in the assessment of the diminution value of the natural resources while restoration is pending. As discussed earlier, the diminution value is divided into two types: actual use value (active-use value) and non-use value (passive-use value). Among various methods of valuation for non-use value, CVM is the most prominent.

---

[614] 33 USCA §2704 (a) (3) and (4).
[615] 33 USCA § 2704 (c) (3).
[616] 33 USCA § 2706.
[617] 33 USCA § 2706 (d) (1) (A)-(C).
[618] 33 USCA § 2702 (b) (1) (A) and (B).

E. Oil Spill Liability Trust Fund (OSLTF)

The OSLTF was established under the American Internal Revenue Code following the enactment of the OPA'90.[619] The fund is mainly financed by a five-cent tax on per barrel of imported and domestic oil.[620] As the fund reached its intended balance of $1 billion in 1994, the tax was discontinued from December 31, 1994.[621] $1.061 billion out of $1.903 billion, accounting for 56% of the present cumulative revenue, came from the oil tax.[622] The rest of the money was generated from transfer of previous funds, interest, cost recovery and fines, representing 19%, 19%, 4% and 2% respectively.[623] Since the expiry of the oil tax, the fund continues to maintain its $1 billion level mainly through the accrual of interest on the principal ($409.3 m.), followed by penalties and fines ($124.6 m.).[624] On the other hand, the IOPC Fund under the international regime does not impose a fixed oil tax. The contribution of the State parties i.e., the oil companies in the States, is determined by dividing the total amount of money necessary to satisfy the expenses of a fiscal year by the total amount of contributing oil in that year.[625]

Although the creation of the OSLTF is not something new to the oil pollution liability regimes,[626] it has much wider scope of application and higher expenditure power than its international counterpart, the IOPC Fund, and previous funds. The OSLTF covers almost all uncompensated oil pollution damage, no matter what the cause of the pollution may be. The only defense to the liability of the fund is the gross negligence or willful misconduct of a claimant.[627] Negligence per se would not preclude a claimant from resorting to the fund, as gross negligence was meant by the legislature to be some thing more than ordinary negligence.[628] Unlike the IOPC Fund, acts of war, hostilities, civil war or insurrection or discharge from government warships or mystery spills are not defenses to liability under the OSLTF.[629]

---

[619] 33 USCA § 2701(11) and 26 U.S.C.§ 9509(a).
[620] See 26 U.S.C.§ 9509(b) and § 4611.
[621] Kim, *supra* note 129 at 118-119.
[622] *Ibid.* The amount shown here is for fiscal year 1997.
[623] *Ibid.* See also 26 U.S.C.§ 9509(b).
[624] Kiern, *supra* note 3 at 546. This figure is for the 1999 fiscal year.
[625] Fund Convention, Article 12 (3).

For a single incident, the OSLTF can spend maximum US$1 billion.[630] However, expenditures for natural resources damage per incident cannot exceed $500 million.[631] There is no other specific limitation on the amount of liability for other kinds of damage, except that payment for any claim other than removal cost will not be made if the fund falls short of $30 million after the payment of removal cost.[632] It is very unlikely that the OSLTF would fall below this limit, considering the existing balance of over $1 billion at the end of 1999, even after the payment of $312 million in removal costs and other damages in that year.[633] Besides, the OSLTF has authority to borrow up to $1 billion to carry out its purposes.[634] In contrast, the maximum liability under the IOPC Fund at present is SDR 135 million (about $178 million).[635] While this amount under the IOPC Fund must be calculated in combination with the shipowners' liability for an incident,[636] the $1 billion liability amount under the OSLTF can be over and above the liability limit of a responsible party for an oil spill under the OPA'90. In other words, unlike the IOPC Fund there is no proportionate reduction in the OSLTF's maximum expenditure limit to the liability of shipowners.

---

[626] The four precursors of OPA'90 had their separate funds for oil pollution. When the OSLTF was created, money from these existing funds was transferred to the OSLTF. See 26 U.S.C. § 9509 (b).

[627] 33 USCA § 2712 (b).

[628] See 135 CONG. REC. H 8157, at 8157and at H 8165.

[629] Fund Convention, Article 4 (2)(a) and (b).

[630] 26 USC § 9509 (c) (2)(A).

[631] *Ibid.*

[632] 26 USC § 9509 (c) (2)(B).

[633] See Kiern, *supra* note 3 at 546.

All claims generally must be presented first to the responsible party before they are submitted to the OSLTF.[637] Regarding the time limit to claim for removal cost, the OPA'90 is more claimant friendly than the international regime. Under the international law, all claims, irrespective of their nature, must be presented within three years from the date of the damage, provided that the damage, for which claims are made, must not occur six years after the incident.[638] The OPA'90 provides for a six-year time limit to bring claims for removal costs after the completion of all removal activities.[639] 'The date of completion' is considered the earlier of the actual completion date of all removal activities or the date determined by the relevant authority as the completion date for cost purpose.[640] There is no condition in the OPA'90 for any damage to become apparent within a certain time limit following an oil spill. The time limit to claim damages for natural resources is the later of three years after the date when the connection of the injury to the incident was reasonably discoverable with the exercise of due care, or three years from the date of completion of the natural resource damage assessment.[641]

---

[634] 26 USC § 9509 (d) (1) and (2).

[635] Fund Convention, Article 4 (4) (a).

[636] *Ibid.*

[637] 33 USCA § 2713 (a). The exceptions are mentioned in 33 USCA § 2713 (b).

[638] Liability Convention, Article VIII.

[639] 33 USCA § 2712 (h) (1).

[640] 33 C.F.R. § 136.101 (a)(2): "For removal costs, within six years after the date of completion of all removal actions for the incident. As used in this paragraph, "date of completion of all removal actions" is defined as the actual date of completion of all removal actions for the incident or the date the FOSC [Federal On-Scene Coordinator] determines that the removal actions which form the basis for the costs being claimed are completed, whichever is earlier". (2002).

III. Negative Aspects of the OPA'90

A. Non-preemption of State laws

Non-preemption of state laws in the OPA'90 is not novel in the American oil pollution liability regime. The precursors of the OPA'90, four federal statutes,[642] also did not preempt state laws on oil spills. However, non-preemption of state laws in those statutes did not allow the imposition of unlimited liability by states, because of the existence of the Limitation of Liability Act.[643] Under the Limitation of Liability Act, the liability of a shipowner was limited to the value of the ship in distress and the pending freight after the incident. The state laws relating to oil spill therefore could not exceed this limit, though the Act was held implicitly repealed when it contradicted with the federal oil pollution statutes.[644] The OPA'90 explicitly removed this barrier to unlimited state liability. S. 1018 (a) of the OPA'90 provides,

"Nothing in this Act or *the Act of March 3, 1851* shall–

---

[641] 33 USCA § 2712 (h) (2); 33 CFR 136.101(a)(1)(ii)(A).

[642] They were the Federal Water Pollution Control Act [Pub. L. No. 92-500, 86 Stat. 816 (1972)], the Outer Continental Shelf Lands Act [Pub. L. No. 95-372, 92 Stat. 629 (1978)], the Deepwater Port Act [Pub. L. No. 93-627, 88 Stat. 2126 (1974)] and the Trans-Alaskan Pipeline Authorization Act [Pub. L. No. 93-153, 87 Stat. 576 (1973)]. See Kim, *supra* note 129 at 79.

[643] The Limitation of Shipowners' Liability Act of 1851[Mar. 3 1851, c. 43, 9 Stat. 635 (46 U.S.C. §§ 181-189 (1989)].

[644] For example, in *In re Glacier Bay*, 944 F. 2d 577, 583 (9th Cir. 1991), it was held that because of their irreconcilability the Trans-Alaskan Pipeline Authorization Act impliedly repealed the Limitation Act. See Kim, *supra* note 129 at 80.

> (1) affect, or be construed or interpreted as preempting, the authority of any State or political subdivision thereof from imposing any additional liability or requirements with respect to –
> (A) the discharge of oil or other pollution by oil within such State; or
> (B) any removal activities in connection with such a discharge;…"[645]

In *In re Jahre Spray II K/S*,[646] the United States District Court for the District of New Jersey held that the OPA'90 preempts the Limitation Act in oil spill cases. So, the claimants are free to move their claims in any courts and there is no requirement for concursus (bringing all claims in one court). In *Complaint of Metlife Capital Corp.*,[647] the First Circuit held that the OPA'90 preempted not only the liability limits in the Limitation Act, but also its concursus requirement as the both Acts are "in irreconcilable conflict, substantially, jurisdictionally, and procedurally."[648] The OPA'90 imposes higher limits of liability than the Limitation Act. While a claimant can bring a suit only in federal courts under the Limitation Act, it can do so under the OPA'90 both in state and in federal courts.[649] In *Bouchard Transportation Co.* v. *Updegraff*,[650] the court reasoned that the application of concursus is no longer necessary under the OPA'90. The need for concursus arises because of the pro rata distribution of the responsible parties' limited liability fund whereas a claimant under the OPA'90 can generally get its claim fully satisfied from the OSLTF when the liability fund of the responsible party is not enough for that purpose.[651]

Because of the preemption of the Limitation of Liability Act and the non-preemption of state laws, no barrier exists to the imposition of unlimited or stricter liability under state laws for oil spills. State law includes both the statutes and common law of the states. For example, in *Dosite Development, Inc.* v. *Arctic Peace Shipping Co.*,[652] a Florida district court held that negligence claims under state common law were not preempted by the OPA'90. Similarly, in *National Shipping Co. of Saudi Arabia* v. *Moran Trade Corp.*,[653] where a tug's negligence caused a vessel to spill oil, the vessel owner resorted to Virginia common law in an action against the tug for the purpose of subrogation. Although the claims failed, it was not because of the preemption of state common law by the OPA'90, but because the section on non-preemption of state laws was interpreted to apply to oil pollution victims and to environmental protection, not to the vessel owners who suffered loss due to oil pollution.

---

[645] 33 USCA § 2718 (a) (1) (A)(B) [emphasis added].
[646] 1997 AMC 845 (US District Court of .N.J. 1996).
[647] 132 F.3d 818, 1998 AMC 635 (1st Cir. 1997), cert. denied, 524 U.S. 952 (1998).
[648] *Ibid.* at 822.
[649] *Ibid.*
[650] 147 F.3d 1345, 1998 AMC 2409 (11th Cir. 1998).
[651] *Ibid.* at 1350.

Non-preemption of state laws does not extend to state laws pertaining to measures to prevent oil pollution; its effect is limited to state liability provisions only. In *United States* v. *Locke*,[654] in response to the challenge of the International Association of Independent Tanker Owners (INTERTANKO) against the prevention and construction regulations promulgated by the State of Washington, the Supreme Court held that the non-preemption of state laws in s.1018 is only applicable to the state liability provisions, the subjects of Title 1 of the OPA'90.[655] As the non-preemption clause is only mentioned in the Title 1, the other titles of the OPA'90 such as prevention and construction provisions are not covered by it.

---

[652] No. 95-808-CIV—J-MMP, 1996 WL 866119 (M.D. Fla. 1996); cited in Swanson, *supra* note 533 at 144.

[653] 1998 AMC 163 (4th Cir. 1997) (per curiam), cert. denied, 523 U.S. 1021 (1998), aff'g 924 F. Supp. 1436, 1996 AMC 2604 (US District Court for the Eastern District of Virginia, Norfolk Division 1996); cited in Swanson, *supra* note 533 at 144-6.

[654] 529 U.S. 89, 2000 AMC 913 (U.S. Supreme Court 2000).

[655] *Ibid.* at 1146.

Many states have unlimited liability either for natural resources damage or property damage or for both. Some states impose unlimited liability not only on shipowners but also on cargo owners. They are Alaska, California, Hawaii, Maryland, North Carolina, Oregon and Washington.[656] Fourteen States have unlimited liability on shipping sector: Alabama, Connecticut, Georgia, Illinois, Maine, Massachusetts, Michigan, Minnesota, Mississippi, New Hampshire, Ohio, Pennsylvania, Rhode Island and South Carolina.[657] From the perspective of the victims of oil pollution, both the affected human being and the environment, unlimited liability on the shipowner for oil spills under various state laws may be a positive aspect of the OPA'90. However, the application of myriad state laws in a single oil spill incident or for a single ship is undesirable as it fails to bring uniformity and predictability in the OPA'90.[658] As there is no requirement of concursus under the OPA'90, a single oil spill can prompt multiple suits in both state and federal courts.[659]

B. Exclusion of 'Public vessel' from liability

Under the OPA'90, public vessels are clearly excluded from any liability, regardless of whether they are used for public purposes or commercial purposes.[660] A 'public vessel' is widely defined to include not only government-owned vessels but also vessels chartered by the government.[661] Government includes Federal and State governments, any political subdivision thereof and also a foreign government.[662] An oil pollution victim may therefore have no redress when affected by oil pollution from the public vessel, except under the OSLTF.[663] Although compensation from the OSLTF rectifies the grievances of an oil pollution victim, it fails to create incentives for the public vessel to take the highest precautions to prevent oil pollution. On the other hand, under the international regime, public vessels used for commercial purposes are liable in the same way as private ships.[664]

---

[656] *Ibid.* at 91.
[657] *Ibid.*
[658] Swanson, *supra* note 533 at 141.
[659] *Ibid.* at 168.
[660] See 33 USCA§ 2710(37).
[661] See 33 USCA§ 2710(29).

C. Civil and Criminal Penalties

Besides imposing general liability for oil pollution damage, the OPA'90 has increased civil, administrative and criminal penalties for violation of oil pollution laws under the Federal Water Pollution Control Act (FWPCA).[665] These penalties can be imposed on a responsible party over and above the civil liability for oil pollution damage.[666] Discharge of oil, except the permitted quantity at a permitted location under the MARPOL or any other government regulation, is prohibited and will attract criminal, civil and administrative penalties.[667] Criminal penalties for failure to immediately notify the appropriate agency of the United States of a discharge can be as high as five years imprisonment, or a fine of $250,000 for an individual and $500,000 for an organization,[668] or a combination of both.[669] Any negligent discharge in violation of the

---

[662] *Ibid.*
[663] 33 USCA § 2713 (b)(1)(A) read together with 33 USCA § 2714 (c)(2).
[664] Article XI (1) and (2) of the Liability Convention.
[665] 33 U.S.C.A. § 1321 (b)(5), (6) and (7); S. 4310 of the OPA'90 (P.L. 101-380).
[666] 33 U.S.C.A. § 2718 (c) (2); 33 U.S.C.A. § 1321 (o) (1).
[667] 33 U.S.C.A. § 1321 (b) (3)-(6).
[668] Z. O. Ozcayr, *Liability For Oil Pollution and Collisions,* (LLP: London, 1998) at 279-280 [hereinafter

FWPCA is punishable by a maximum penalty of one-year imprisonment and a fine of $25,000; knowing violation by a maximum penalty of three years imprisonment and a fine of $50,000; and "knowing endangerment"[670] by a maximum penalty of fifteen years imprisonment and a fine of $1 million.[671]

Administrative penalties are of two classes: class I civil penalties are $10,000 per violation and the maximum cannot exceed $25,000; class II penalties are also $10,000 per violation but the maximum can be as high as $125,000.[672] Violations occur when oil or a hazardous substance is discharged into the water, or when the owner, operator or the person in charge of the discharging vessel or facility fails or refuses to comply with any regulation under the FWPCA.[673]

There are also civil penalties. For discharge of oil or hazardous substances, the civil penalty will be either $25,000 per day of violation or an amount up to $1,000 per barrel of oil.[674] If a person fails to properly remove the discharged oil or hazardous substance, or fails to comply with an administrative order protecting public health, the civil penalty can be either an amount up to $25,000 per day of violation or an amount up to 3 times the cost incurred by the OSLTF as a result of such failure.[675] Failure to comply with any regulation issued under the FWPCA will attract a civil penalty of

---

Ozcayr].

[669] 33 U.S.C.A. § 1321 (b) (5).

[670] An act or omission "which places another person in imminent danger of death or serious bodily injury". Kiern, *supra* note 3 at 571.

[671] See R.V. Randle, *The Oil Pollution Act of 1990: Its provisions, Intent, and Effects,* Oil Pollution Deskbook 3 (Envtl. Law Inst. 1991) at 14; Cited in Kiern, *supra* note 3 at note 662.

[672] 33 U.S.C.A. § 1321 (b) (6) (B) (i) and (ii).

[673] 33 U.S.C.A. § 1321 (b) (6) (A).

[674] 33 U.S.C.A. § 1321 (b) (7) (A).

[675] 33 U.S.C.A. § 1321 (b) (7) (B) (i) and (ii).

$25,000 per day of violation.[676] If the discharge was the result of gross negligence or willful misconduct, the minimum penalty will be $100,000 and the maximum can be $3,000 per barrel.[677] It is noteworthy here that a civil and an administrative penalty cannot be imposed simultaneously.[678]

The US Coast Guard frequently uses the criminal provisions and the courts impose very high penalties under the above provisions. In *T/S Command* incident, a fine of $9.4 million was imposed on the shipowner for the discharge of oil and the failure to notify the relevant authority about the discharge.[679] In *North Cape*, a fine of $9.5 million was imposed on the responsible party for the negligent discharge of 843,000 gallons of oil.[680] In *Morris J. Berman*, the court also imposed a fine of $75 million on the responsible party for the negligent discharge of 750,000 gallons of oil.[681] These are but a few recent examples of criminal penalties.

Civil penalty provisions have also been used in many cases, although the amount of penalty is much lesser than that of criminal penalty. For example, for a 210,000 gallon pipeline oil spill in the State of Washington, Texaco Refining and Marketing Inc. paid a civil penalty of $480,000 to the US government and $20,000 to the State of Washington.[682] The penalties are in addition to Texaco's own cleanup cost of $8 million and the payment of government's removal costs of $1.25 million.[683] In another pipeline oil spill in Washington, the US Oil and Refining Company paid the US government

---

[676] 33 U.S.C.A. § 1321 (b) (7) (C).
[677] 33 U.S.C.A. § 1321 (b) (7) (D).
[678] 33 U.S.C.A. § 1321 (b) (7) (F).
[679] Kiern *supra* note 3 at 571-2.
[680] *Ibid.* at 572.
[681] *Ibid.*
[682] Ozcayr, *supra* note 668 at 280-1.
[683] *Ibid.*

$425,000 as civil penalty in addition to $4 million cleanup costs and $60,000 for the government's removal costs.[684]

Although the penalty provisions are meant to have deterrent effect on persons involved in oil transport, their frequent use sometimes encourages responsible parties to refuse cooperation with the law enforcement authorities.[685] For example, in the *New Carissa* spill, the master of the vessel did not cooperate with the Coast Guard.[686] Provisions on imprisonment are also used against master and crew. Their frequent use may deprive the USA of the services of the best mariners as they are becoming less interested in ships navigating on US waters. As the captain of the *BT Alaska* testified to Congress:

> Increasing emphasis on criminal enforcement for marine casualties that put oil in the water, even where these casualties are the result of perils of the sea beyond our control, will drive the best elements of the U.S. merchant marine away from where they are needed the most…. Unfortunately, the U.S. government seems to be taking the position that any accident that leads to pollution is a criminal act.[687]

As the evidence suggests, most of the criminal charges for oil pollution lack *mens rea* i.e.; the criminal intention of doing the wrongful act or omission.[688] Criminal penalties should only be used when there is a deliberate or grossly negligent discharge of oil. The government authority in charge should try its best to deal with oil pollution problem within the parameters of civil liability as far as possible. The high amount of civil liability carries enough incentives for seafaring vessels to take the utmost care to prevent the possibility of a spill.

---

[684] *Ibid.*
[685] See Kiern, *supra* note 3 at 573.
[686] *Ibid.*
[687] J. Glass, "U.S. Move to Curb Criminal Oil Spill Prosecutions," (1998) Lloyd's List International, May 15, 1; cited in Kiern, *supra* note 3 at 574.
[688] *Ibid.* at 567. He also quoted a Coast Guard commander saying, "the Government need not show knowledge or negligence, but need only show that the prohibited conduct occurred,…. [and the owners or employees] could be convicted and sentenced to a criminal fine even where [they] took all reasonable precautions to avoid the discharge."

On the other hand, the international regime does not have any penalty provisions, whether civil or criminal. This is because it is only meant to regulate civil liability for oil pollution, as the names of the Conventions suggest. However, the state parties to the Conventions may bring criminal actions under their national legislation against a party if its criminal provisions have been violated. For example, in the *Aegean Sea,* the Spanish government successfully brought proceedings against both the master and pilot for criminal negligence.[689] Similarly, in the *Sea Empress* and *Nissos Amorgos* incidents, the UK and Venezuelan authorities respectively brought criminal charges against the responsible parties under the local Acts for oil pollution.[690] However, the use of criminal action by state parties to the international regime is very rare in oil pollution cases.

V. Conclusion

The OPA'90 is a comprehensive oil spill liability and compensation scheme. It is an overall successful piece of legislation. After the enactment of the Act, the number of large spills (over 10,000 gallons) decreased by 50%; the average amount of spills dropped 64% and there have been no spills in the USA over one million gallons.[691] This has been made possible by higher liability amounts and stricter regulations for economic loss and environmental damage under the Act. There is no bigger deterrent than the imposition of huge pecuniary liability on shipowners to take extra caution when transporting oil. However, the non-preemption of state laws in the OPA'90, along with the preemption of the Limitation of Liability Act, fails to bring uniformity and predictability in the OPA'90. Although the imposition of criminal and civil penalties is necessary to deter negligent polluters, the indiscriminate and frequent use of penalties hinders their effectiveness as deterrent measures. Where however the few negative aspects are rectified, the OPA'90 may become the best oil pollution liability regime the world has so far witnessed.

---

[689] See *Annual Report 2001:the IOPC Fund, supra* note 9 at 47-8.

[690] *Ibid.* at 67-8 and 76-7.

[691] See *Joint Hearing on the Oil Pollution Act of 1990 Before the Subcommittee On Coast Guard and Maritime Transportation And Water Resources and Environment of the House Committee On Transportation and Infrastructure,* 106th Cong. (1999) (Statement of Admiral James M. Loy, Commandant, United States Coast Guard). Cited in Kiern, *supra* note 3 at 487.

CONCLUSION

International oil pollution liability has improved a lot since the *Torrey Canyon* incident in 1967. It is now a strict liability regime, thus making it unnecessary for a victim of oil pollution to prove various causes of action in common law. However, common law has, at least, one advantage over the statutory regime of international law. When a cause of action is established under common law, a plaintiff gets full compensation, provided that the defendant has the resources to pay. On the other hand, under the international regime, the victims have secure funds by virtue of compulsory insurance on the part of shipowners and the availability of the IOPC Fund. However, the funds will be distributed on pro-rata basis among the claimants when their established claims exceed the IOPC Fund and the shipowners' liability limit.

The United States, the world biggest oil consumer, did not ratify the international conventions because they were inadequate and pre-empted state law. The U.S statutory regime, under the OPA'90, although largely drawn from the experience of the international regime, fares better than the international conventions in terms of compensation. Some of its features include a higher liability limit, an easily breakable test to deny the shipowner the privilege of limitation, the OSLTF with $ 1 billion expenditure power for each incident and a wider scope of environmental damage. These features make the US regime significantly better than the international oil pollution liability regime, although it is far from perfect. Its main problems are the non-preemption of state laws, excessive civil and criminal penalties and the exclusion of public vessels from liability.

The main problem of the international oil pollution liability regime used to be the inadequacy of the compensation amount. However, the IMO has recently taken initiatives to solve this problem. At the IMO diplomatic conference in May 12-16, 2003, the IMO adopted the Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992.[692] The 2003 Protocol, when it comes into force, will create a third tier of compensation over and above the existing limit. The maximum available amount under the Protocol would be SDR 750 million (just over US$1 billion).[693] The Protocol will come into force three months after at least eight States, who have received a combined total of 450 million tons of contributing oil, have ratified it.[694]

Although the Protocol addressed the main problem in the international regime, the solution will help only the developed countries, which are better able to provide the huge contributions. Developing countries cannot afford to pay even the minimum contributions, as the minimum contributions will be assessed on the basis of a presumed 1 million tons of contributing oil receipts in each contracting state, regardless of the actual oil receipts in that state.[695] In addition, the Protocol failed to solve the other existing problems in the international regime. However, a resolution was made in the May 2003 conference requesting the 1992 Fund Assembly to review the 1992 Conventions for possible improvements.[696] To solve the other existing problems in the international liability regime, some recommendations are offered below:

---

[692] LEG/CONF.14/20. This is an IOPC Fund document, where the new Protocol is published.
[693] *Ibid.* Article 4.
[694] *Ibid.* Article 21.
[695] *Ibid.* Article 14.
[696] Conference resolution 3: Review of the international compensation regime for oil pollution damage for possible improvement. LEG/CONF.14/22.

Amendment Procedures

There should be some mechanism to adjust the regular inflation of the SDR without going through all the amendment procedures. In this regard, the Conventions could benefit from the experience of the 1999 Montreal Convention for aviation liability.[697] In order to obviate the need for constant amendments, the 1999 Montreal Convention in Article 24 provides that the monetary limits be reviewed every five years and adjusted for inflation. Alternatively, the time period between different stages of the amendment procedure should be shortened in order to allow changes to be made every two or three years, if necessary. It is noteworthy here that under the 2003 Protocol once the IMO Legal Committee adopts an increase it will take seven and half years to propose a further increase in the supplementary fund,[698] whereas it takes eleven and half years to do the same under the existing 1992 Conventions.

Test to break the liability limit

The old justifications for shipowners' right to limit their liability no longer hold good and the new one, the capacity of insurance market, is weak. The international oil pollution liability regime would be better off to totally extinguish the system of limitation. Even if the right of limitation continues to exist, albeit at a higher limit, the right should be denied if the incident occurs due to the negligence of the shipowners or their employees. The 1992 Liability Convention should be amended to return to the original 1969 Liability Convention. Under the original version of the 1969 Liability

---

[697] Convention for the Unification of Certain Rules for International Carriage by Air, done May 28, 1999, ICAO Doc. 9740 [hereinafter Montreal Convention]. See also B. I. Rodriguez, "RECENT DEVELOPMENTS IN AVIATION LIABILITY LAW" (2000) 66 J. Air L. & Com. 21.

[698] See article 24 of the 2003 Protocol.

Convention, in order to take the advantage of the right, a shipowner had to prove that there was no 'actual fault or privity' on its part with regard to the cause of the incident.[699] Alternatively, the international liability regime could follow the OPA'90 in this regard. Under the OPA'90, the right is lost if an oil spill incident is proximately caused by gross negligence or willful misconduct of the shipowner, charter, operator or any agent or employee of them.[700] The OPA'90 also denies the right where there is a violation of any applicable Federal safety, construction, or operating regulation and the violation is the proximate cause of the incident.[701]

Environmental Damage

The problems of ownership and *locus standi* with regard to claims for environmental damage have been solved, to a large extent, by providing the contracting states with the authority to claim for clean up costs or restoration costs for the damaged environment. When restoration is not possible, the international regime does not provide any compensation. In such a situation, the court can award the reasonable cost of acquiring comparable natural resources.[702] Alternatively, various theories, including the Contingent Valuation Method (CVM), were developed to assess compensation. However, the international regime does not recognize these theoretical valuation techniques. Although the theoretical valuation methods are not 100% accurate, outright exclusion of these methods will leave environmental damage under-compensated, particularly when restoration is not possible. Therefore, the international system should be flexible in accepting the theoretical valuation methods, in the least instance, as a last resort.

---

[699] Art.V.2 of the Liability Convention, 1969.

[700] 33 USCA § 2704 (c) (1) (a) and (b).

[701] *Ibid.*

[702] See Grady, *supra* note 312 at 427.

Rectifying these problems will improve the international oil pollution regime and protect it from future disintegration. It will protect the international regime from future attacks, as has occurred with the EU proposal to create its liability fund. Similar attacks may, in future, come from the growing number of states concerned about the environment who want a liability regime with higher compensation, wider scope of environmental damage and with no right for shipowners to limit their liability.

When these problems are solved, there may be some hope that the United States will one day join the international regime.[703] Since the present US oil pollution regime provides better compensation mechanisms, there is no incentive for the US to ratify the international regime. The US presence can make the international regime financially stronger because of the huge volume of oil transport into that country, especially considering the fact that contributions to the IOPC Fund are assessed on the basis of oil received in a state party.

---

[703] As sec. 3001 of the OPA'90 provides, "It is the sense of the Congress that it is in the best interests of the United States to participate in an international oil pollution liability and compensation regime that is at least as effective as Federal and State laws in preventing incidents and in guaranteeing full and prompt compensation for damages resulting from incidents."

BIBLIOGRAPHY

Statutory Materials

Convention on Limitation of Liability for Maritime Claims, 1976; 16 I.L.M 606 (1977).

International Convention on Civil Liability for Oil Pollution Damage, 1969, 973 U.N.T.S.3' 9 I.L.M. 45 (1970).

International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1971; 16 I.L.M 621 (1972).

Limitation of Liability Act, the Limitation of Shipowners' Liability Act of 1851[Mar. 3 1851, c. 43, 9 Stat. 635 (46 U.S.C. §§ 181-189 (1989)].

Marine Liability Act, 2001. S.C.2001, c6.

Oil Pollution Act of 1990; PL 101-380 (HR 1465), codified at 33 USCA §§ 2701-2761.

Proposal for a Regulation of the European Parliament and of the Council on the establishment of a fund for the compensation of oil pollution damage in European waters and related, COM (2000) 802 final at 2000/0326 (COD) [hereinafter COM (2000) 802 final], online: EU Homepage <http://www.europa.eu.int/comm/dgs/energy_transport/library/erika2_en_final.pdf>(date accessed: 6 August 2002).

Protocol of 1996 to amend the Convention on Limitation of Liability for Maritime Claims, 1976. 35 I.L.M. 1433 (1996).

Protocol of 2003 to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage, 1992, For draft Protocol, see 92FUND/A.6/28, Annex I. For final Protocol, see LEG/CONF.14/20.

Cases

Adilman's Ltd. v. *Bill Boyd's Radio (T.V.) Clinic* (1982), 19 Sask. R. 215 (Q.B.).

Anns v. *Merton London Borough Council*. [1978] A.C. 728 (H.L).

Assie v. *Sask. Telecommunications*, (1978), 7 C.C.L.T. 39 (Sask. C.A.).

Attorney General v. *PYA Quarries Ltd*, [1957] 2 Q.B. 169 (Court of Appeal).

B.C.Tel. v. *Shell Can. Ltd.* (1987), 13 B.C.L.R. (2d) 210 (S.C.).

Ballard Shipping Co. v. *Beach Shellfish.*, 32 F.3d 623, 1994 AMC 2705 (1st Cir. 1994).

Blanchard v. *Cormier*, (1980), 112 D.L.R. (3d) 667 (N.B.C.A.).

Bouchard Transportation Co. v. *Updegraff*, 147 F.3d 1345, 1998 AMC 2409 (11th Cir. 1998).

Boucher v. *Lawson*, (1734) 95 Eng. Rep. 53.

British Transport Commission v. *Gourley* [1956] AC 185 at 208 (H.L.).

Cambridge Water Co v. *Eastern Counties Leather plc*, [1994] 2 A.C. 264 (H.L.).

Canadian National Railway v. *Norsk Pacific Steamship Co.*, [1992] 1 S.C.R. 1021, 11 C.C.L.T. (2d) 1, 91 D.L.R. (4th) 289 (S.C.C.).

Commonwealth of Puerto Rico v. *The SS Zoe Colocotroni*, 456 F.Supp 1327 (D.P.R. 1978) (US District Court for the District of Puerto Rico), affirmed in par, vacated in part, remanded, 628 F. 2d 652 (1st Cir.1980), cert. denied 450 U.S. 912 (1981).

Commonwealth v. *Agway, Inc.*, 210 Pa Super Ct. 150, (1967 Superior Court of Pennsylvania).

Complaint of Metlife Capital Corp., 132 F.3d 818, 1998 AMC 635 (1st Cir. 1997), cert. denied, 524 U.S. 952 (1998).

D. & F. Estates Ltd. v. *Church Commrs. for England*, [1988] 2 All E. R. 992 (H.L.).

Davey v. *Harrow Corp.* [1957] All ER 305 (Court of Appeal).

Doherty v. *Allen* (1987), 86 N.B.R. (2d) 361 (Q.B.), affirmed (1988), 55 D.L.R. (4th) 746 (N.B.C.A.).

Donoghue v. *Stevenson*, [1932] A.C. 562 (H.L.).

Dosite Development, Inc. v. *Arctic Peace Shipping Co.*, No. 95-808-CIV—J-MMP, 1996 WL 866119 (M.D. Fla. 1996).

Fowler v. *Lanning*, [1959] 2 W.L.R. 249 (Queen's Bench Division).

Gatlin Oil Co. v. *U.S.*, 169 F.3d 207 (4th Cir. 1999).

Geer v. *Connecticut*, 161 U.S. 519 (1896) (US Supreme Court).

General Electric Co. v. *United States Department of Commerce*, 128 F.3d 767 (US Court of Appeals for the District of Columbia Circuit 1997).

Georgia v. *Tennessee Copper Co.*, 206 U.S. 230 (1907) (US Supreme Court).

Hampton v. *North Carolina Pulp Company*, 223 N.C. 535, 27 S.E. 2d 538 (Supreme Court of North Carolina 1943).

Hedley Byrne & Co. v. *Heller & Partners Ltd.*, [1963] 2 All E. R. 575 (H.L.).

Hickey et al v. *Electric Reduction Co. of Canada, Ltd.*, 21 D.L.R. (3d) 368 (Nfld Supreme Court, 1970).

Hughes v. *Oklahoma*, 441 U.S. 322 (1979) (US Supreme Court).

Illinois Central Railroad v. *Illinois*, 146 U.S. 387 (1892) (US Supreme Court).

In re Barracuda Tanker Corp., 281 F. Supp. 228, 1968 U.S. Dist. LEXIS 9998 (S.D.N.Y. 1968).

In re Glacier Bay, 944 F. 2d 577, 583 (9th Cir. 1991).

In re Jahre Spray II K/S, 1997 AMC 845 (US District Court of .N.J. 1996).

In re Oil Spill by The Amoco Cadiz, 954 F.2d 1279 (7the circuit, 1992).

Kamloops (City) v. *Nielsen*, [1984] 2 S.C.R. 2 (S.C.C.).

La Coste v. *Department of Conservation*, 263 U.S. 545 (1924) (US Supreme Court).

Landcatch Ltd. v. *International Oil Pollution Compensation Fund* [1999] 2 Lloyd's Rep. 316 at 335 (Scotland Second Division Inner House Court of Session).

Letang v. *Couper*, [1965] 1QB 232 (Court of Appeal).

Lim v. *Camden Health Authority,* [1980] A.C.174, 187 (House of Lords).

Liverpool, Brazil and River Plate Steam Navigation Co. v. *Brooklyn Eastern District Terminal,* 251 U.S. 48 at 53 (US Supreme Court 1919).

Livingstone v. *Rawyards Coal Co* (1880) 5 App. Cas. 25.

Mann v. *Saulnier* (1959) 19 D.L.R. (2nd)130 (N.B.C.A.).

Maryland Cas. Co. v. *Cushing*, (1954) 347 U.S. 409 at 437 (US Supreme Court).

Maryland v. *Amerada Hess Corp.*, 350 F. Supp. 1060, 1066 (D. Md. 1972) (US District Court for the District of Maryland).

Masonite Corporation v. *Steede,* 198 Miss. 547, 23 So. 2d 756 (Supreme Court of Mississippi 1945).

McRae v. *British Norwegian Whaling Co., Ltd.*, [1927-31] Nfld. L.R. 274.

Metson v. *R.W.DeWolfe Ltd.*, (1980) 14 C.C.L.T. 216 (N.S.T.D.).

Moore v. *American Transportation Co.*, 65 U.S. 1 (Supreme Court of the United States 1860).

Morrison S. S .Co. v. *Greystoke Castle (Cargo Owners)*, [1947] A.C. 265 [1946] 2 All E.R. 696 (H.L.).

Murphy v. *Brentwood District Council,* [1991] 1 A.C.398 (H.L).

National Shipping Co. of Saudi Arabia v. *Moran Trade Corp.*, 1998 AMC 163 (4th Cir. 1997) (per curiam), cert. denied, 523 U.S. 1021 (1998), aff'g 924 F. Supp. 1436, 1996 AMC 2604 (US District Court for the Eastern District of Virginia, Norfolk Division 1996).

National Shipping Co. v. *Moran Mid-Atlantic Corp.* 924 F. Supp. 1436 (US District Court for the Eastern District Court for the Eastern District of Virginia, Norfolk Division. 1996), aff'g, 1998 A.M.C. 163 (4th Cir. 1997).

New Jersey Steam Navig. Co. v. *The Merchants' Bank of Boston (The Lexington)*, (1848 Supreme Court of the United States) 47 U.S. (6 How.) 344.

Newell v. *R.E. Newell Fisheries Ltd.* (1982), 54 N.S.R. (2d) 652 (T.D.).

Newman v. *Conair Aviation Ltd* (1972) 33 DLR (3d) 474.

North York v. *Kert Chem. Indust.*, (1985), 33 C.C.L.T. 184 (Ont. H.C.).

Overseas Tankship (U.K.) Ltd. v. *Miller Steamship Co. Pty. (The Wagon Mound (No. 2))* [1967] 1 A.C. 617, (P.C).
Peabody Donation Funds Govs. v. *Sir Lindsay Parkinson & Co,* [1985] A.C. 210 (H.L.).

Petition of Cleveland Tankers, Inc., 791 F. Supp. 669, 1992 AMC 1727 (US District Court for the Eastern District of Michigan, Southern Division 1992).

R. v. *The Ship "Sun Diamond"*, [1984] 1 F.C. 3; 1983 F.C. LEXIS 172: 25 C.C.L.T. 19 (Federal Court).

Re The Sucarseco (1935), 294 U.S. 394, 55 S.Ct. 467 (US Supreme Court).

Read v. *J. Lyons & Co.*, [1946] 2 All E.R. 471 (H.L.).

Rigby v. *Chief Constable of Northamptonshire*, [1985] 2 All E.R. 985 (Q.B.D.).

Rivtow Marine Ltd. v. *Washington Iron Works*, (1973), 40 D.L.R. (3d) 530 (S.C.C.).

Robins Dry Dock & Repair Co. v. *Flint*, 275 U.S. 303, 1928 AMC 61 (1927).

Ross v. *Wall*, (1980), 14 C.C.L.T. 243 (B.C.C.A.).

Rylands v. *Fletcher,* (1866) L.R. 1 Ex. 265 (Court of Exchequer Chamber); (1868) L.R. 3 H.L. 330 (House of Lords).

St. Lawrence Construction Ltd. v. *Federal Commerce & Navigation Co.*, [1985] 1 F.C. 767 (C.A.).

Sekco Energy, Inc. v. *M/V Margaret Chouest,* 820 F. Supp. 1008, 1994 AMC 1515 (US District Court for the Eastern District of Louisiana 1993).

Smith v. *Great Western Rly and Anglo-American Oil C*o (1926) 135 LT 112.

South Port Marine, LLC v. *Gulf Oil Ltd. Pshp.*, 73 F. Supp. 2d 17, 2000 AMC 658 (US District Court for the District of Maine 1999), affirmed in part, reversed in part and remanded, 234 F.3d 58, 2000 U.S. App. LEXIS 31178, 2001 A.M.C. 609, 51 Env't Rep. Cas. (BNA) 1749, 31 Envtl. L. Rep. 20344 (1st Cir. Me. 2000).

Southport Corporation v. *Esso Petroleum Company Ltd.* [1] [1953] 2 Lloyd's Rep. 414 (Trial Div.); [1954] 1 Lloyd's Rep. (Court of Appeal.) 446; [1955] 2 Lloyd's Rep 655 (House of Lords).

State v. *Dickinson Cheese Co.*, 200 N.W. 2d 59 (N.D. 1972) (Supreme Court of North Dakota).

State v. *Jersey Central Power & Light*, 125 N.J. Super. Ct. 97, 308 A.2d 671 (1973) (Superior Court of New Jersey).

Swan v. *Salisbury Construction Co* [1966] 1 W.L.R 204 (Privy Council).

Tate & Lyle Indust. Ltd. v. *Greater London Council*, [1983] 2 A.C. 509 (H.L.).

The Bramley Moore, [1963] 2 Lloyd's Rep. 429, at p.437 (Court of Appeal).

The Lady Gwendolen, [1965] P.294; [1965] 1 Lloyd's Rep. 335 (Provate Division).

The Main v. *Williams*, 152 U.S. 122 at 126 (1894) (Supreme Court of the United States).

The Pas v. *Porky Packers Ltd.*, (1976), 65 D.L.R. (3d) 1 (S.C.C.).

Tock v. *St. John's Metro. Area Bd.*, (1989) 64 D.L.R. (4th) 620 (S.C.C.).

Toomer v. *Witsell,* 334 U.S. 385 (1948) (US Supreme Court).

Triangle Steel & Supply Co. v. *Korean United Lines Inc.*, (1985), 32 C.C.L.T. 105 (B.C.C.A.).

Ultramares Corp. v. *Touche,* 174 N.E. 441(Court of Appeals of N.Y.1931).

Union Oil Co. v. *Oppen*, (1974), 501 F. 2d 558 (9th Cir.).

United States v. *Conoco,* 916 F. Supp.581, 1996 AMC 872 (US District Court for the Eastern District of Louisiana 1996).

United States v. *Hyundai Merchant Marine Co.*, 172 F.3d 1187, 1999 AMC 1521 (9th Cir.), cert. denied, 528 U.S. 963 (1999).

United States v. *Locke,* 529 U.S. 89, 2000 AMC 913 (U.S. Supreme Court 2000).

United States v. *M/V Big Sam*, 681 F.2d 432, 1983 AMC 2730, 2739 (5th Cir. 1982).

Valley Husky (Bermuda) Ltd. v. *St John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210, 153 D.L.R. (4th) 385 (S.C.C.).

Wagon Mound (No.1) [1961] AC 388 (P.C).

Winnipeg Condominium Corp. No. 36 v. *Bird Construction Co.*, (1995), 23 C.C.L.T. (2d)

1(S.C.C.).

Yuen Kun-yeu v. *A.G. Hong Kong,* [1987] 2 All E.R. 705 (P.C.).

Books

Annual Report 2001: International Oil Pollution Compensation Fund (London: IOPC Funds, 2001).

B. Feldthusen, *Economic Negligence: The Recovery of Pure Economic Loss*, 4th ed., (Ontario: Carswell, 2000).

B.A. Garner, ed. *Black's Law Dictionary*, 7th ed. (St. Paul, MN: West Publishing, 1999).

W. Abecassis and R. L. Jarashow, *Oil Pollution from Ships*, 2d ed. (London: Stevens & Sons, 1985).

David W. Abecassis, *The Law and Practice relating to Oil Pollution from Ships* (London: Butterworths, 1978).

G. Gauci, *Oil Pollution at Sea: Civil liability and Compensation for Damage*, (Chichester: John Wiley & Sons Ltd, 1997).

G. Gilmore and C.L.Black, *The Law of Admiralty* (2d ed) (New York: The Foundation Press Inc., 1975).

I. Kim, *Restructuring the Liability Regime in the Oil Pollution Act of 1990* (PhD Thesis, Stanford University, 2000).

International Oil Pollution Compensation (IOPC) Fund 1992: Claim Manuals (London: International Oil Pollution Compensation Fund, 2000).

J.G. Fleming, *The Law of Torts,* 9th ed. (Sydney: LBC Information Services, 1998).

L.N. Klar, *Tort Law*, 2nd ed. (Toronto: Carswell, 1996).

O. W. Holmes, *The Common Law*, (Boston: Little, Brown and Company, 1949).

Osborn's Concise Law Dictionary, 7th ed., (Delhi: Universal Law Publishing Co. Pvt. Ltd., 1997).

P. H. Osborne, *The Law of Torts*, (Toronto: Irwin Law, 2000).

R.V. Randle, *The Oil Pollution Act of 1990: Its provisions, Intent, and Effects,* Oil Pollution Deskbook 3 (Envtl. Law Inst. 1991).

Ship-source Oil Pollution: the Administrator's Annual Report 2000-2001 (Ottawa: the Administrator of Ship-source Oil Pollution, 2001).

Steven J. Hazelwood, *P&I Clubs: Law and Practice*, (2nd ed.) (London: Lloyd's of London Press Ltd., 1994).

Texts of the 1992 Conventions on Liability and Compensation for Oil Pollution Damage (International Oil Pollution Compensation Fund 1992: 2001).

UN Convention on the Law of the Sea. (New York, 1997) (UN Publication, Sales No. E.97.V.10).

W.V.H. Rogers, *Winfield & Jolowicz on Tort*, 15th ed. (London: Sweet & Maxwell, 1998).

Wu Chao, *Pollution from the Carriage of Oil by Sea: Liability and Compensation* (London: Kluwer Law International Ltd, 1996).

Xia Chen, *Limitation of Liability for Maritime Claims: A Study of US Law, Chinese Law and International Conventions* (The Hague: Kluwer Law International, 2001).

Z. O. Ozcayr, *Liability for Oil Pollution and Collisions,* (LLP: London, 1998).

Articles

A. H. E. Popp, "Limitation of Liability in Maritime Law- An Assessment of its Viability from a Canadian Perspective", (1993) 24 J. of Mar. L. & Comm. 335.

B. I. Rodriguez, "RECENT DEVELOPMENTS IN AVIATION LIABILITY LAW" (2000) 66 J. Air L. & Com. 21.

B. Soyer, " 1996 Protocol to the 1976 Limitation Convention: A More Satisfactory Global Limitation Regime ;for the Next Millennium?", [2000] J. Bus. L. (Journal of Business Law).

Blanca I. Rodriguez, "Recent developments in aviation liability law" (2000) 66 Journal of Air Law and Commerce 21.

Cohen, "Bleeding Hearts and Peeling Floors: Compensation for Economic Loss at the House of Lords" (1984) 18 U.B.C.L. Rev. 289.

David Steel, "Ships are different : the case for limitation of liability" [1995] LMCLQ 77.

E. Gold, "Marine Pollution Liability After "Exxon Valdez": The U.S. "All-Or-Nothing Lottery!" (1991) 22 Journal of Maritime Law and Commerce 423.

G. M. Chalos, "A Practical Guide to the Oil Spill Liability Trust Fund Claim Submission Procedures", (1999) 3 U. Denv. Water L. Rev. 80.

H. Putnam, "The Limited Liability of Ship-owners for Master's Faults" (1883) 17 Am. L. Rev. 1.

J. Glass, "U.S. Move to Curb Criminal Oil Spill Prosecutions," (1998) Lloyd's List International, May 15.

J. J.Donovan, "The Origins and Development of Limitation of Shipowners' Liability" (1979) 53 Tulane Law Review, 999.

K.T.Grady, "*Commonwealth of Puerto Rico* v. *SS Zoe Colocotroni*: State Actions for Damage to Non-Commercial Living Natural Resources", (1980-1) 9 Boston College Environmental Affairs Law Review 397.

L.I. Kiern, "Liability, Compensation, and Financial Responsibility Under the Oil Pollution Act of 1990: A Review of the First Decade" (2000) 24 Tulane Maritime Law Journal, 481.

L. Shi, "Successful Use of the Tacit Acceptance Procedure to effectuate Progress in International Maritime Law", (1999) 11 University of San Francisco Maritime Law

Journal 299.

Lord Mustill, "Ships are different-or are they?" [1993] LMCLQ (Lloyd's Maritime and Commercial Law Quarterly) 490.

M. Holt and G.R. Cecil, "Natural Resources Damages for Oil Spills: The International Context" (1995) 9 Natural Resources & Environment 28 (4).

M. Jacobson and N. Trotz, "The Definition of Pollution Damage in the 1984 Protocols to the 1969 Civil Liability Convention and the 1971 Fund Convention", (1985) J. Mar. L & Comm. 467.

M. Montesinos, "It May Be Silly, But It's An Answer: The Need To Accept Contingent Valuation Methodology In Natural Resources Damage Assessments" (1999) 26 Ecology Law Quarterly 48.

P. Griggs, "Limitation of Liability for Maritime Claims: the search for international uniformity", (1997) Lloyd's Maritime and Commercial Law Quarterly 369.

Prof.E.Selvig, "An Introduction to the 1976 Convention", in *Limitation of Shipowners' Liability: the New Law* (London: Sweet & Maxwell, 1986) 3.

Raul A.F. Pedrozo, "Transport of nuclear cargoes by sea" (1997) 28 Journal of Maritime Law and Commerce, 207.

Rui M. Fernandes, "The Limitation of Liability of a Shipowner in Anglo-Canadian Law" (1985) 16 J. Mar. L. & Comm. 219.

S.R.Swanson, "OPA 90 + 10: The Oil Pollution Act of 1990 After Ten Years", (2001) J. Mar. L. & Com. 135.

T.J.Wagner, "The Oil Pollution Act of 1990: An Analysis", (1990)21 J. Mar.L & Comm, 569.

W. Tetley, "Shipowners' Limitation of Liability and Conflicts of Law: The Properly Applicable Law" (1992) 23 J. of Mar. L. & Comm. 585.

Websites

EU Homepage <http://www.europa.eu.int/comm/dgs/energy_transport/library/erika2_en_final.pdf> (date accessed: 01 July 2003).

Exxon Valdez Oil Spill Trustee Council Homepage <http://www.oilspill.state.ak.us/facts/details.html.> (date accessed: 23 June 2002).

IMF Homepage <http://www.imf.org/external/np/tre/sdr/basket.htm> (last modified: 01 July 2003).

IOPC Fund Homepage < http://www.iopcfund.org/prestige.htm > (last modified: 16 May 2003).

Office of Response and Restoration, National Ocean Service, National Oceanic and Atmospheric Administration Homepage <http://response.restoration.noaa.gov/> (Followed the link 'photos of ships') (last modified: 17July 2001).

UK P&I Club Homepage <http://www.ukpandi.com/> (date accessed: 30 November 2001).

Others

Hearing on H.R.4550 Before the House Committee on Merchant Marine and Fisheries, 74th Cong., 1st Sess. (1935).

Joint Hearing on the Oil Pollution Act of 1990 Before the Subcommittee On Coast Guard and Maritime Transportation And Water Resources and Environment of the House Committee On Transportation and Infrastructure, 106th Cong. (1999).